In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PETITIONER,
v.
LEOPOLD BARUCH.
} No. ——.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF THEREON.

The Solicitor-General, on behalf of the petitioner, respectfully prays for a writ of certiorari to review a decree of the United States Circuit Court of Appeals for the Second Circuit, which reversed the judgment of the Circuit Court affirming the decision of the Board of General Appraisers, and adjudged that articles commercially known as "featherstitch braids" are not subject to duty as braids at the rate of 60 per cent ad valorem under the specific provision therefor in paragraph 339 of the tariff act of 1897, but are dutiable as bindings at the rate of 45 per cent ad valorem under paragraph 320 of said act.

22979—10——1

BRIEF IN SUPPORT OF THE PETITION.

STATEMENT.

The articles are braids, loom woven, of white or colored threads throughout, or of mixed white and variously colored threads, of cotton or other vegetable fiber, and ornamented with raised figures in various designs, some of which have plain and others scalloped or looped edges.

They were invoiced as "Cotton featherstitch braids" and returned by the appraiser as "Cotton braids, sixty per cent."

The tariff provisions mentioned are as follows:

Paragraph 339:

> Laces, lace window curtains, tidies, pillow shams, bed sets, insertings, flouncings, and other lace articles; handkerchiefs, napkins, wearing apparel, and other articles, made wholly or in part of lace, or in imitation of lace; nets or nettings, veils and veilings, etamines, vitrages, neck rufflings, ruchings, tuckings, flutings, and quillings; embroideries and all trimmings, including braids, edgings, insertings, flouncings, galloons, gorings, and bands; wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a letter, monogram, or otherwise; tamboured or appliquéed articles, fabrics or wearing apparel; hemstitched or tucked flouncings or skirtings, and articles made wholly or in part of rufflings, tuckings, or ruchings; all of the foregoing, composed wholly

or in chief value of flax, cotton, or other vegetable fiber, and not elsewhere specially provided for in this act, whether composed in part of india rubber or otherwise, sixty per centum ad valorem: *Provided*, That no wearing apparel or other article or textile fabric, when embroidered by hand or machinery, shall pay duty at a less rate than that imposed in any schedule of this act upon any embroideries of the materials of which such embroidery is composed.

Paragraph 320:

Bandings, beltings, bindings, bone casings, cords, garters, linings for bicycle tires, ribbons, suspenders and braces, tapes, tubing, and webs or webbing, any of the foregoing articles made of cotton or other vegetable fiber, whether composed in part of india rubber or otherwise, and not embroidered by hand or machinery, forty-five per centum ad valorem; spindle banding, woven, braided or twisted lamp, stove, or candle wicking made of cotton or other vegetable fiber, ten cents per pound and fifteen per centum ad valorem; loom harness or healds made of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, fifty cents per pound and twenty-five per centum ad valorem; boot, shoe, and corset lacings made of cotton or other vegetable fiber, twenty-five cents per pound and fifteen per centum ad valorem; labels, for garments or other articles, composed of cotton or other vegetable fiber, fifty cents per pound and thirty per centum ad valorem.

The importers protested against the assessment of duties at the rate of 60 per cent ad valorem under paragraph 339, claiming, among other provisions, paragraph 320 as the proper classification (R., 11, 12). The Board of General Appraisers overruled the protest, following *Vom Baur* v. *United States* (141 Fed., 439).

The Circuit Court affirmed the board's decision.

The Circuit Court of Appeals reversed the judgment of the Circuit Court and held that although the articles are commercially designated as "featherstitch braids," they are nevertheless dutiable as "bindings," because they are braids "otherwise specially provided for" in paragraph 320.

Petitioner prays for a writ of certiorari in order that the judgment entered by said Circuit Court of Appeals may be reviewed by this court, and in support thereof assigns the following grounds:

I. A writ of certiorari should be issued, if for no other reason, because the decisions of courts in the same and in different circuits are in conflict.

II. This issue is of great importance (1) because of the amount of revenue involved and (2) because a principle of classification which this court has given first rank is in question.

III. The articles are not bindings as well as braids, in trade, ordinary, or tariff meaning, and, therefore, are dutiable at 60 per cent ad valorem under paragraph 339, as held by the Board of General Appraisers and the Circuit Court, and not at 45 per cent ad valorem under paragraph 320, as held by the Circuit Court of Appeals.

I.

A writ of certiorari should be issued, if for no other reason, because decisions of courts in the same and in different circuits are in conflict.

In the *Dieckerhoff case* (54 Fed., 161) the Circuit Court for the Southern District of New York affirmed the decision of the Board of General Appraisers that featherstitch braids woven on a loom, as in the present case, and commercially so designated, were dutiable as cotton braids under paragraph 354 of the tariff act of 1890, which corresponded to paragraph 320 of the tariff act of 1897, with, however, a provision for "braids" instead of for "bindings," and were not dutiable as cotton trimmings under paragraph 373 of said act, which corresponded to paragraph 339 of the tariff act of 1897, but did not, like the latter, contain a specific provision for braids.

The Treasury Department, on advice of the Attorney-General, acquiesced in this decision, and extended it to contested importations of featherstitch braids which had been classified as trimmings under the tariff act of 1883.

In *Hiller* v. *United States* (106 Fed., 73) the Circuit Court of Appeals for the Second Circuit affirmed the judgment of the Circuit Court, which had affirmed the decision of the Board of General Appraisers that certain braids intended to be manufactured into shoe laces, though not trimmings, were dutiable as braids at 60 per cent ad valorem under paragraph 339 of the tariff act of 1897, it being held that the word "including" before "braids," etc., in that paragraph was

used not by way of specification, but by way of addition.

A petition for a writ of certiorari was denied by this court. (180 U. S., 639.)

In *Steinhardt* v. *United States* (121 Fed., 442) the Circuit Court for the Southern District of New York reversed the decision of the Board of General Appraisers, and held that narrow woven tape of cotton, used largely for covering the seams of underwear and waists, was dutiable as a binding or tape at 45 per cent ad valorem under paragraph 320 of the tariff act of 1897, and not as a braid dutiable at 60 per cent ad valorem under paragraph 339.

No witnesses were called for the Government, and commercial designation was not established.

The court reversed the board's decision on the strength of the definition in the Standard Dictionary that a braid is "a narrow, flat tape or woven strip for binding the edges of fabrics, or for ornamenting them."

In *Hague* v. *United States* (T. D. 25466—not reported in the Federal Reporter) the Steinhardt case was followed.

In *Vom Baur* v. *United States* (141 Fed., 439) the Circuit Court for the Southern District of New York affirmed the decision of the Board of General Appraisers that featherstitch braids produced by a process of weaving and not of braiding are commercially known as "braids," and are dutiable as such under paragraph 339, tariff act of 1897, and not under paragraph 320 relating to bindings, tapes, etc.

An appeal taken by the importer to the Circuit Court of Appeals was dismissed without prejudice. (T. D. 27397, suit No. 3640.)

In *Marshall Field & Co.* v. *United States* (T. D. 29548, suit 2015) the Circuit Court for the Northern District of Illinois affirmed the decision of the Board of General Appraisers that featherstitch braids are commercially known as braids, and are dutiable at 60 per cent ad valorem under paragraph 339 of the tariff act of 1897.

An appeal to the Circuit Court of Appeals was dismissed at the request of the importer after the decision of the Circuit Court of Appeals in the present case.

It therefore appears that five other cases involving the classification of featherstitch braids have been tried. The first case (Dieckerhoff) was decided against the Government, because the merchandise, although not made on braiding machines, was held to be commercially known as featherstitch braids and not trimmings, and paragraph 354 of the tariff act of 1890 expressly included "braids," while paragraph 373, under which the Government insisted it should be classified, did not. The two cases in which the Government established commercial designation for the merchandise as featherstitch braids were decided in its favor. The two adverse decisions (Steinhardt and Hague) rested on the definition of a dictionary and were followed in the present case, notwithstanding proof of commercial designation, which was wanting in the cases followed.

The importer abandoned its appeal to the Circuit Court of Appeals, Seventh Circuit, in *Marshall Field & Co.* v. *United States, supra*, after the decision of the Circuit Court of Appeals, Second Circuit, was rendered in the case at bar. By that action the decision in the Seventh Circuit is entitled to the same weight as the decision in the Second Circuit; and being in conflict with each other and with prior cases on the same subject, a writ of certiorari is sought to have the decisions reviewed by this court and the dutiable classification of all such imported merchandise finally determined.

Recent cases in which writs of certiorari have been issued to review conflicting decisions are as follows:

Chew Hing Lung v. *Wise* (176 U. S., 156).

Frankenburg Co. v. *United States* (206 U. S., 224).

Komada v. *United States*, decided on January 3, 1910.

In *Chew Hing Lung* v. *Wise* this court said (p. 157):

> Upon application by the importers this court granted a writ of certiorari, it being alleged that there were inconsistent decisions in the circuit courts of appeals on this question.

In *Frankenburg Co.* v. *United States* the Circuit Court of Appeals for the Second Circuit referred to a decision of the Circuit Court of Appeals in the Seventh Circuit and adhered to a former ruling,

> * * * leaving the question *to the Supreme Court to secure uniformity by determining which of the conflicting constructions of the paragraph is the correct one.*

II.

This issue is of great importance (1) because of the amount of revenue involved, and (2) because a principle of classification which this court has given first rank is in question.

(1) On June 26, 1909, 3,351 protests involving duties calculated at $104,110.50 were held in the suspended files of the Board of General Appraisers awaiting a determination of this issue.

(2) The rule of classification of imported merchandise by commercial designation is applicable and should have been adhered to by the Circuit Court of Appeals.

This court has held that commercial designation is of first importance and must govern classification, unless it clearly appears that Congress intended some other meaning. (*Robertson* v. *Salomon*, 130 U. S., 412, 415; *Curtis* v. *Martin*, 3 How., 106, 109; *Arthur* v. *Morrison*, 96 U. S., 108, 111; *Arthur* v. *Butterfield*, 125 U. S., 70, 75; *Hedden* v. *Richard*, 149 U. S., 346, 349; *Roosevelt* v. *Maxwell*, 3 Blatchf., 391, Fed. Cas., 12034; *Greenleaf* v. *Goodrich*, 101 U. S., 278, 282; *American Net and Twine Co.* v. *Worthington*, 141 U. S., 468, 471; *Cadwalader* v. *Zeh*, 151 U. S., 171, 176; *Chew Hing Lung* v. *Wise*, 176 U. S., 156, 161; *Goat and Sheepskin Import Co.* v. *U. S.*, 206 U. S., 194, 203.)

22979—10——2

III.

The articles are not bindings as well as braids, in trade, ordinary or tariff meaning, and, therefore, are dutiable at 60 per cent ad valorem under paragraph 339 as held by the Board of General Appraisers and the Circuit Court, and not at 45 per cent ad valorem under paragraph 320 as held by the Circuit Court of Appeals.

There can be no doubt that commercial designation is established for these articles as featherstitch braids. The testimony clearly shows it (R., 33, 51, 54, 99, 100, 102, 111, 112, 117, 118, 120, 121, 123, 124, 126, 130, 134, 136, 137); the Board of General Appraisers and the Circuit Court so found and held, and the Circuit Court of Appeals admits it, but nevertheless classifies them as bindings.

The evidence in the Vom Baur case (R., 152–283) and Steinhardt case (R., 284–303) is part of the record here. No additional evidence was taken by the board, which quoted its full opinion in the Vom Baur case, wherein the testimony was reviewed and the board said (R., 18):

> The goods are labeled "featherstitch braids," as shown by the several exhibits introduced in evidence. Seven of the witnesses produced samples of importations made by the firms with which they were connected, and with one exception they were labeled "featherstitch braids." We think the testimony of the witnesses, when carefully examined, shows that the articles are commercially known as "featherstitch braids" and that they have been so known since 1890.

Voluminous testimony was taken in the Circuit Court, which said in part (R., 305):

> The board found that these goods were known generally in the trade as featherstitch braids prior to 1897. The further testimony taken in court does not tend to weaken that conclusion; in truth, it serves to strengthen it. At the hearing the importers acquiesced in the board's decision in so far as it related to Collective Exhibit C, and were more or less faint-hearted in their attack upon Collective Exhibit B. If they can divest themselves for a moment of the influence which self-interest furnishes, they will see that the logic of the situation sweeps Collective Exhibit A into the same net.

The Circuit Court of Appeals said in part (R., —):

> This article has borne various names, such as "seam binding," "featherstitch binding," "featherstitch tape," etc., but the name by which it has usually been called is "featherstitch braid." Indeed, while the article is not braided but woven, we should have little difficulty in adopting the conclusion of the Circuit Court and of the Board of Appraisers that prior to 1897 it was generally commercially designated as "featherstitch braid."

The Circuit Court of Appeals, however, found "the reasoning in the Steinhardt case persuasive," and failed "to find that the additional evidence requires any different conclusion." In that case no testimony was offered for the Government, and the Circuit Court relied on a dictionary definition of braid

as "a narrow, flat tape or woven strip for binding the edges of fabrics, or for ornamenting them." No appeal was taken, but another case (Vom Baur) was prepared in which evidence was introduced establishing commercial designation for such merchandise as featherstitch braids. (R., 152 to 283.) From the decision in the latter case, the importer took an appeal but did not prosecute it.

The Court of Appeals holds that the articles are not dutiable as braids, because they are "elsewhere specially provided for" as bindings. These braids are not bindings either in commercial or ordinary signification or in use, and therefore are not elsewhere provided for under that name.

The definition of braid relied on in the Steinhardt and in this case, to the exclusion of commercial designation, does not show that the articles are bindings. *They are not used for "binding the edges of fabrics," but "for ornamenting them."* The definition of binding controls. Webster, Worcester, and the Century all limit it to somthing that binds or secures the *edges* of cloth from unraveling. The Standard contains a similar limitation in its definition of the verb "to bind," which is—

> to strengthen or ornament at the *edge* with a bind; as to bind a carpet or garment.

The Century defines the verb—

> to form a *border or edge on*, for the purpose of strengthening or ornamenting; *edge;* as to bind a wheel with a tire; to bind a garment or a carpet.

Commercial usage accords with the ordinary meaning. The testimony for the Government is explicit that such articles are not called bindings in the trade. *Every witness called for the Government in this case so testified.*

Farrell (R., 103):

> Q. Would you call any of these exhibits I have shown you (referring to Collective Exhibits A, B, and C) bindings?
>
> A. I wouldn't call these bindings; no, not any of them.
>
> Q. They are not known in the trade as bindings?
>
> A. No, not as bindings.

Wilson (R., 107):

> By Mr. WASHBURN:
>
> Q. For covering seams or binding seams?
>
> A. For trimming. They are featherstitch braids, used for trimmings and used over the seams.
>
> Q. Seam coverings, aren't they?
>
> A. Yes.
>
> By Mr. NICHOLS:
>
> Q. How are they ordered?
>
> A. Featherstitch braids.
>
> Q. When you have said "seam coverings" you only described their use?
>
> A. Their use; they are put over the seams, on account of the fancy work on them; that makes them the trimming.
>
> Q. Could you use any of them as binding?
>
> A. No, sir.
>
> Q. They are never called bindings?
>
> A. No, sir.

Q. Are you familiar with what are known in the trade as bindings?

A. I buy them.

Q. You mean bindings are something entirely distinct from these exhibits?

A. Yes, sir.

Forsythe (R., 111):

Q. Can they be used as bindings?

A. No, sir.

Q. Are you familiar with what is known in the trade as bindings?

A. Yes.

Q. Are they an entirely distinct class of goods?

A. Yes; entirely.

Q. Would the fact that these Exhibits A and B are sometimes used to cover seams, would that make them bindings in any sense?

A. No; they couldn't be used as a binding; they are used as a finish, the narrow ones are used as a finish, where they join a seam together, like this here [indicating].

Stern (R., 118, 119):

Q. Are you familiar with what is known as bindings in the trade?

A. Yes, sir.

Q. And are they a different kind of article?

A. Different kind of articles.

Q. Sold as——

A. Sold as bindings.

Q. Referring to this Exhibit E, for instance, and the narrow piece of cloth that is used to cover the seam, made out of the same material

as the garment, is that what you call a—or what would you call that?

A. A binding tape.

Q. Does that in any way resemble any of these Exhibits A, B, or C?

A. No, sir.

Schloss (R., 125):

By Mr. NICHOLS:

Q. Are any of these goods known as "bindings" in the trade?

A. No.

By Mr. WASHBURN:

Q. You don't carry bindings, do you?

A. Yes; we sell and manufacture and buy bindings.

Williams (R., 126, 127):

Q. They are bought and sold under the name featherstitch braids?

A. No other term.

Q. Are any of them known as bindings?

A. I would say no.

Q. That is a distinct class of articles, bindings?

A. Yes.

Heaphy (R., 134):

Q. You have always bought them under the commercial term featherstitch braids?

A. Yes, sir.

Q. And they are not bought as bindings?

A. No, sir.

Q. Or by any other name in fact?

A. No, sir; featherstitch braids is the only term that is ever used by us.

There is, moreover, testimony of witnesses for the importer to the same effect. Importer Steinhardt, in his case, defined binding (R., 288) as—

> * * * a tape, of silk or cotton, for finishing articles, to finish the *ends*, to complete an article.

Blaskopf, importer's witness in the present case, after stating on cross-examination that the seam covering is a braid, testified on redirect examination (R., 38):

> Q. Do you call it a binding also?
> A. You can not very well call it a binding, no; more of a braid, finishing braid.
> Q. It is, however, a seam binding?
> A. It is a seam banding.

"Seam bindings," one of many subsidiary terms applied to these braids, is merely descriptive of use as coverings of seams. Cotton "bindings," commercially, is a specific term for tapes or strips used to bind the edges of garments. They are folded or doubled over the edge. (R., 38, 100, 102 to 104, 107, 111, 112, 114, 116, 118, 125 to 127, 134, 144 to 146.) So-called "seam bindings" do not bind anything, but, as admitted by witnesses for the importer, are used flat to cover seams, and give the garment a better or finished appearance. (R., 34, 45, 63, 144 to 146.) Efforts of counsel for the importer to show that *silk taffeta* bindings are used flat (R., 130, 135, 136, 141) do not tend to prove that cotton bindings are so used.

Featherstitch braids are more expensive and elaborate than bindings, and are used essentially to ornament or embellish garments (R., 39, 40, 45, 46, 52, 58, 91, 92, 103 to 107, 118, 119, 127, 135, 143, 144 to 147), *while bindings serve a practical use, namely, to keep edges from unraveling.*

In 1897 braids, galloons, and other articles in the nature of trimmings, used to ornament or give finish to garments, were taken out of the paragraph for articles of utility like tapes, and put into the paragraph for laces and embroideries, and bindings (cotton) were provided for *eo nomine*, for the first time, in the former paragraph. The two articles belong to different classes. In *Hiller* v. *United States, supra*, deciding that cotton braids of all kinds are within paragraph 339 of the tariff of 1897, it was said:

> * * * A comparison of the provisions of the cotton schedules in the acts of 1894 and 1897 in regard to the classification of braids, is, however, quite significant of the intent of Congress. Paragraph 263 of the act of 1894, which corresponded to paragraph 320 of the act of 1897, imposed a duty of 45 per centum ad valorem upon cords, braids, etc., made of cotton, but braids are omitted in paragraph 320 of the new act, which imposed the same duty. Paragraph 276 of the act of 1894, which corresponded to paragraph 339 of the new act, omitted braids, which was inserted in paragraph 339, the one under consideration. *This comparison of the two acts indicates that Congress intentionally took braids out of the 45*

per cent paragraph, where it had been in 1894, and put the article into a paragraph imposing a higher rate of duty; and that it intended to impose the rate upon the articles generally, irrespective of the use to which they might be applied.

It does not follow from the use of the phrase "not elsewhere specially provided for" in paragraph 339 of the tariff act of 1897 that some *braids* are elsewhere specially provided for. The paragraph contains general terms, like lace and embroidered articles, to which the phrase may be applied without including enumerations *eo nomine* such as braids. It does not follow that because the words of limitation are applicable to *some* of the articles named in the paragraph they must be applicable to *all*, and require search to be made elsewhere in the act for more specific designation of articles provided for *eo nomine*.

The rule that for tariff purposes commercial designation of an article, when clearly established, fixes its character, is not deprived of its ordinary application by such expressions as "not otherwise provided for" or "not specially provided for." The case of *Arthur* v. *Lahey* (96 U. S., 112, 118) is directly in point. In summing up the conclusions reached in that case, the court said:

> 1. The commercial designation of an article among traders and importers, when clearly established, fixes its character for the purpose of the tariff laws.
>
> 2. When Congress has designated an article by its specific name, and imposed a duty upon

it by such name, general terms in a subsequent act, or in a later part of the same act, although sufficiently broad to comprehend such article, are not applicable to it.

3. That the expression, "not otherwise provided for," in the eighth section of the act of 1864, does not deprive these rules of their ordinary application.

See also *United States* v. *Schwarz* (140 Fed., 302); *Thomas* v. *Schwarz* (140 Fed., 989).

The principle adopted by the Court of Appeals is, it is insisted, in direct conflict with the rule here stated. The evidence shows, and the Board of General Appraisers, the Circuit Court, and also the Court of Appeals have all found that the merchandise in question is "featherstitch braid;" and "braid" is specifically provided for *by name* in paragraph 339. On the other hand, "braid" is not mentioned in paragraph 320, but the Court of Appeals found, by referring to one dictionary, that the word "binding" might include a form of braid, and hence held that it was "specially provided for" there. It is difficult to perceive how it was there "specially provided for," when it had to be spelled into another word by the use of a dictionary. The word "specially," as here used, must mean something more definite than as held by the court. If such a rule should be applied generally to tariff provisions, it would render almost impossible efficient administration of the law, and the designation of an article by name in a paragraph with such words of limitation would mean practically nothing, as one would have

to take his dictionary in hand and turn to the other paragraphs to ascertain whether there might not be a word elsewhere which would embrace it.

That the adoption of such a rule of interpretation would be unfortunate is shown by the fact that the result would sometimes depend upon what dictionary might be consulted by the court. This is well illustrated by the present case, as the Court of Appeals relies upon the definition of binding as given in the Standard Dictionary, whereas the definition here applicable of the word "binding" as given by Webster is "something that secures the edge of cloth from raveling," and the word "braid" is not used at all. The court would certainly not have held that the "braid" in question was specially provided for in the word "something." (*Koechl* v. *United States*, 84 Fed., 448, C. C. A.)

That cotton "braids" and "bindings" are independent enumerations *eo nomine* and stand for different articles is shown beyond a doubt by the tariff of 1909, which provides for braids and bindings in the same paragraph—349—and makes both dutiable at 60 per cent ad valorem.

The fact that the braids in issue were woven on a loom and not made on a braiding machine is immaterial, as shown by the decisions in other braid cases, *supra*, and by the principle repeatedly declared that the method of fabrication does not control classification, and indeed by the holding of the Circuit Court of Appeals in this case.

The importer admits that a large portion of the merchandise in suit—all represented by importer's Collective Exhibit C, and part, at least, of Exhibit B—is dutiable as braids, and, as stated by the Circuit Court (R., 305), "the logic of the situation sweeps Collective Exhibit A into the same net."

In view of the importance of this issue and of conflict of decisions, and of apparent error of the court below, it is respectfully asked that the writ of certiorari be granted.

LLOYD W. BOWERS,
Solicitor-General.

D. FRANK LLOYD,
Deputy Assistant Attorney-General.

JANUARY, 1910.

O

In the Supreme Court of the United States,

OCTOBER TERM, 1909.

THE UNITED STATES, Petitioner, vs. LEOPOLD BARUCH, Respondent.	No.

BRIEF OPPOSING PETITION FOR CERTIORARI.

Statement.

The Solicitor General errs in stating on page 21 of his brief that importers admit "part at least of Exhibit B is dutiable as braids." The respondent contends that the narrow goods like Exhibits A and B (primarily articles of utility) are bindings by ordinary meaning, by fabrication, by use, as well as by trade understanding, trade practice and trade nomenclature, and admits that wide goods like Exhibit C (primarily articles of ornamentation which are not involved in this petition) are braids in the nature of trimmings and not otherwise provided for than in paragraph 339. He further contends that Exhibits A and B fail to meet the description "braids not elsewhere specially provided for," in that they are specially provided for under the specific provision in paragraph 320 for cotton "bindings," *which was inserted for the first time in tariff legislation in the Act of 1897.*

I.

There is no conflict of decisions of courts in the same or different circuits. On the contrary, the granting of this writ would result in bringing before this Court for review but one opinion of a Circuit Court of Appeals.

The Government contends that the writ should be issued "if for no other reason, because decisions of courts in the same or in different circuits are in conflict" and cites in support of its contention six cases in which it alleges different conclusions have been reached on the question decided by the Circuit Court of Appeals in the present case. The cases relied upon to sustain this contention are:

In re Dieckerhoff, 54 Fed. Rep., 161.
Hiller vs. United States, 106 Fed. Rep., 73.
Steinhardt vs. United States, 121 Fed. Rep., 442.
Hague vs. United States, T. D. 25, 466— not reported in the Federal Reporter.
Vom Baur vs. United States, 141 Fed. Rep., 439.
Marshall Field & Co. vs. United States, T. D. 29, 548, Suit 2015.

Four of the foregoing cases, the Dieckerhoff, Steinhardt, Hague and Vom Baur cases, all arose in the Southern District of New York, and were all considered by the Circuit Court of Appeals in the present case, as will be seen by a reference to the opinion of the Court.

In only two of these cases was there any opinion. The Dieckerhoff case, one of these, and the first case relied on by the Government, was brought under the Act of 1890, wherein there was a provision for braids, not qualified as in the Act of 1897 by the words not specially provided for. The Court below in its opinion, which is printed as an appendix to this brief, clearly distinguishes this case in the following language:

> "This decision (the Dieckerhoff decision), however, has no special bearing upon the question now under consideration because, as we have seen, bindings were not provided for in the act of 1890. Featherstitch

braids may well not be trimmings within the ornamental article paragraph of the earlier act and yet be bindings within the useful article paragraph of the act of 1897.

"The Government, however, insists that in view of the Dieckerhoff decision it must be presumed that, when Congress used the word 'braids' in the act of 1897, it intended that it should apply to featherstitch braids. As just pointed out, however, all that that case held was that the articles were braids and not trimmings. It did not hold that they were not bindings. And Congress used the word 'braid' only with words of qualification."

In the other case in which an opinion was filed—the Steinhardt case—the Circuit Court held that the articles, if braids, were bindings as well, and therefore dutiable under Paragraph 320, as decided by the Circuit Court of Appeals. The decision in the Steinhardt case was followed by the Hague case. This latter case is reported only in T. D. 25, 466, where this footnote appears :

"In this case the Government has prosecuted an appeal to the Circuit Court of Appeals for the second circuit."

Subsequently this appeal was dismissed without consent upon an *ex parte* affidavit of the United States Attorney for the southern district of New York, as the Court records show.

T. D. 25, 901, Suit 3214.

The remaining case brought in the southern district of New York—*Vom Baur vs. United States*—was decided *contra*, but the Circuit Court rendered no opinion on the subject, and simply affirmed the decision of the Board of Appraisers without opinion of its own. The Circuit Court of Appeals for the Second Circuit reviewed that decision and overruled it in the case at bar, *so that there is only one authoritative opinion on this issue in that circuit—the opinion to which this petition for certiorari is directed.*

The remaining two cases cited by the Government—*Hiller vs. United States* and *Marshall Field & Co. vs. United States* —may easily be disposed of. All that was decided in the Hiller case was that the word "including" in paragraph 339

("trimmings, including braids") was used not by way of specification, but by way of addition. The merchandise involved, unlike that in the case at bar, was certain shoe lace braids, concededly braids in fabrication, and not known by any other name. In other words, the Court's attention was directed exclusively to the force and effect of the word "including" in paragraph 339 and the precise issue here sought to be reviewed was not before the court.

In the Marshall Field case, the last case relied upon by the Government, the Circuit Court for the Northern District of Illinois, without argument, affirmed the decision of the Board of United States General Appraisers, following the then latest expression of a court of co-ordinate jurisdiction, that of the Circuit Court for the Southern District of New York in the case at bar, subsequently reversed by the Circuit Court of Appeals for the Second Circuit. After the decision in the case at bar was rendered, the appeal of *Marshall Field & Co. vs. United States*, when it was reached on the docket of the Circuit Court of Appeals for the Seventh Circuit, was dismissed and an order of dismissal, duly consented to, was formally entered. The Court thus disposed of the appeal without any hearing on the merits.

The Government urges that the dismissal of this appeal was equivalent to an affirmance of the decision of the Circuit Court and that therefore there is a conflict of opinion between the Circuit Court of Appeals for the Second Circuit and the Circuit Court of Appeals for the Seventh Circuit. The consent order of dismissal of the appeal in the Marshall Field case was in the following language:

> "it is Ordered that the appeal herein be and the same is hereby dismissed."

It thus clearly appears that no judgment of affirmance or decree was entered, and it is respectfully insisted that the dismissal without any hearing on the merits is not equivalent to a decision on the merits, nor is it, as claimed by the learned Solicitor-General, entitled to the same weight as the decision in the Second Circuit in the case at bar.

United States vs. Gomez, 23 How., 326, 339.
Aurora City vs. West, 7 Wall., 82, 93.
Greene vs. United Shoe Machinery Co. (C. C. A.) 124 Fed. Rep., 961, 964.

In *United States vs. Gomez* (*supra*), this Court said:

> "A motion to docket and dismiss a cause from the failure of the appellant to file the record within the time required by the rule of this court, when granted, is not an affirmance of the judgment of the Court below."

In *Aurora City vs. West, 7 Wall., 82, 93*, Mr. Justice CLIFFORD, speaking for this Court said:

> "Unless a final judgment or decree is rendered in a suit, the proceedings in the same are never regarded as a bar to a subsequent action. Consequently where the action was discontinued, or the plaintiff became non-suit, or where from any other cause, except perhaps in the case of a *retraxit*, no judgment or decree was rendered in the case, the proceedings are not conclusive.'

In *Greene vs. United Shoe Machinery Co.* the Circuit Court of Appeals for the First Circuit said:

> "We may well add here that the Supreme Court has
> "shown a growing tendency to approve the practice of
> "making it clear that a dismissal is without prejudice,
> "or without a hearing on the merits, when there has
> "been no such hearing."

Further, this Court has held, as to its own decisions, that where a question was not contested in one case, the Court would not hold itself bound by the view expressed in that case, in a subsequent case where the question was contested.

Cross vs. Burke, 146 U. S., 82, 87.
United States vs. More, 3 Cranch, 159, 172.

> "A motion to dismiss an appeal in effect requests the Appellate Court to refuse examination of the merits of the cause."
>
> *Carlson vs. Alameda County*, 70 Cal., 630.
> *Hall vs. El Dorado County*, 68 Cal., 24.
> *Matthews vs. Marion County*, 68 Cal., 638.

> "Questions, therefore, which affect the merits will not be considered by the Appellate Court on such a motion, as they are grounds for reversal or affirmance of the judgment."
>
> *Nelson vs. Leland*, 22 How., 48, 49.
> *Day vs. Washburn*, 23 How., 310, 312.
> *Hill vs. Chicago, etc. Ry.*, 129 U. S., 170, 174.

> "It is the general rule that the appellant may have his own appeal dismissed at any time while the cause remains within the jurisdiction of the Appellate Court."
> *Latham vs. U. S.*, 9 Wall., 145.

The appellee is entitled to costs on such dismissal, but can not object, nor is his consent required.

Latham vs. U. S., 9 Wall., 145.
Deming's Appeal, 10 Wall., 251.

> "A decision dismissing an appeal removes the whole cause out of the Appellate Court, and remits the parties to their legal rights and condition existing prior to the taking of the appeal."
> *U. S. vs. Gomez*, 23 How., 326.

See

Ency. Pl. & Pr., Vol. 2, 346, 350, 351.

We submit that the foregoing authorities conclusively show that there is no warrant for the Government's contention that there is any conflicting decision by reason of the action of the Circuit Court of Appeals, Seventh Circuit, in dismissing the appeal.

This action was in point of fact no more an adjudication upon the merits than was the action of the Circuit Court of Appeals for the Second Circuit in dismissing the Government's appeal in the Hague case, *supra*. There is no contention on the part of the learned Solicitor General that that dismissal was equivalent to a decision on the merits.

II.

As to the amount of revenue involved, and the alleged importance of the issue.

The learned Solicitor General states on page 9 of his brief:

> "On June 26, 1909, 3,351 protests involving duties calculated at $104,110.50 were held in the suspended files of the Board of General Appraisers awaiting a determination of this issue."

These protests which are now, for the most part, covered by suits pending in various Circuit Courts of the United States, chiefly in the Southern District of New York, on records identical to the one here involved, were filed during the lifetime of the Act of July 24, 1897, and cover a period of substantially twelve years. In other words, the Government has illegally exacted under the decision here sought to be reviewed an excess of duties approximating $8,600 a year on the average, which would not seem to make this issue one of great importance, relatively speaking, because of the amount of revenue involved.

This issue is of interest to only a limited group of importers, and no longer affects the trade and commerce of this country. The tariff act under which the question arose has been repealed, and the controversy does not continue under the tariff act of August 5, 1909. Hence this case is not one "of public concern," nor are the questions involved "of such gravity or general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them."

In re Woods, 143 U. S., 202, 206.

Upon analysis it will be found that no important principle of classification is involved in this suit, but rather the question of fact which Judge NOYES carefully considered and passed upon in his opinion, whether or not the articles in controversy were braids that were elsewhere more specifically provided for in the Tariff Act of 1897 than in paragraph 339.

III.

The rule of classification by commercial designation is not applicable because the language of the paragraphs in question is descriptive rather than commercial.

The language of the competing paragraphs in so far as relevant is as follows :

> "339. * * * Embroideries and all trimmings, including braids, * * * ; all of the foregoing composed wholly or in chief value of flax, cotton, or other vegetable fibre, and not elsewhere specially provided for in this Act, whether composed in partof india rubber or otherwise, sixty per cent. ad valorem."

> "320. Bindings, * * * any of the foregoing articles made of cotton or other vegetable fibre, whether composed in part of india rubber or otherwise, and not embroidered by hand or machinery, forty-five per centum ad valorem."

This language is plainly descriptive, and not commercial. Under the decisions of this Court, the doctrine of commercial designation, therefore, in the present instance is not of primary importance.

In *Barber vs. Schell*, 107 U. S., 617, certain laces and insertings composed wholly of cotton were involved. Mr. Justice BLATCHFORD, speaking for this Court, said (p. 621) :

> "The designations qualified by the words 'cotton', in the act of 1846, are designations of articles by special description, as contradistinguished from designations by a commercial name or a name of trade. They are designations of quality and material. * * * This was the view applied by Mr. Justice NELSON in *Reimer vs. Schell*, 4 Blatchf., 328, in 1859, to colored cotton hosiery, under the provisions in question, and we think it a sound one. It was the view adopted by the Circuit Court in this case. There is no question of commercial designation. Hence, the cases cited and relied on by the importers are not in their favor."

Thereupon the Court proceeded to distinguish numerous cases, notably *Arthur vs. Lahey, 96 U. S., 112*, cited by the learned Solicitor General on page 18 of his brief.

Furthermore the reasoning of this Court in *United States vs. Klumpp, 169 U. S., 209, 216*, shows conclusively that the case of Arthur vs. Lahey is not in point.

The question in the Klumpp case was whether certain worsted dress goods were or were not affected by a provision for a reduction in duties on manufactures of wool, and Mr. Chief Justice FULLER delivering the opinion of the Court, in holding that they were, said:

> "It will be perceived that the Acts of 1890 and 1894 did not levy duty on 'worsted dress goods' *eo nomine*, nor on worsted dress goods by commercial designation, nor on worsted dress goods as distinguished from woolen dress goods; but a duty on dress goods, whether made of 'wool, worsted, the hair of the camel, goat, alpaca or other animals'. The description is addressed to the quality and material of the goods, namely, women's and children's dress goods, made of wool, worsted, etc.
>
> "The principle then that the special designation of an article by its commercial meaning should prevail over general terms used in the same or a later act, has no application."

So, here, Congress has not designated this merchandise by its specific name, featherstitch bindings, or seam bindings or featherstitch braids, but has inserted a broad descriptive provision in paragraph 339 to include such braids composed wholly or chiefly of cotton, flax, or jute as were not elsewhere specially provided for in the Act.

The cases cited by the learned Solicitor General on page 9 of his brief are not in point. When analyzed they will be found to construe not descriptive language but *eo nomine* unlimited provisions of the statute shown to have definite, trade meanings. Thus:

"Vegetables," *Robertson vs. Salomon*, 130 U. S., 412; "Cotton Bagging," *Curtis vs. Martin*, 3 How., 106; "Silk Veils," *Arthur vs. Morrison*, 96 U. S., 108; "Finished Furniture," *Hedden vs. Richard*, 149 U. S., 346; "Gilling Twine," *American Net & Twine Co. vs. Worthington*, 141 U. S., 468;

"Toys," *Cadwalader vs. Zeh*, 151 U. S., 171; "Tapioca," *Chew Hing Lung vs. Wise*, 176 U. S., 156; "Wool," *Goat & Sheepskin Import Co. vs. United States*, 206 U. S., 194.

Greenleaf vs. Goodrich, 101 U. S., 278, cited on page 9 of the Government brief, holding the words "delaines, * * * composed wholly or in part of worsted, wool, mohair, or goat's hair, and on all goods of similar description" to be descriptive, supports the respondent's contention that the rule of commercial designation is not applicable when it appears from the statute itself that the dutiable merchandise is referred to in descriptive terms rather than in the phraseology employed in trade. The language of paragraph 339 is not "braids," but, as we have seen, "trimmings, including braids, * * * ; all the foregoing composed wholly or in chief value of flax, cotton or other vegetable fibre, and not elsewhere specially provided for in this Act."

In *Schiff vs. United States, 99 Fed. Rep., 552* (C. C. A., Second Circuit) it was said with reference to a provision for braids * * * composed of straw, etc.:

> "We have here no question of commercial designation. The tariff act does not lay duty upon 'straw braid'—a term which might have a definite meaning in trade and commerce—but upon 'braids composed of straw,' etc., and there is no evidence that the words 'straw,' 'chip,' or 'grass,' when applied to the raw material, have any peculiar commercial meaning."
>
> 99 Fed. Rep., p. 557.

IV.

Congress in transferring the unqualified provisions for "braids" from the notions paragraph (263) of the Act of 1894 to the trimmings paragraph (339) of the Act of 1897, making it read "trimmings, including braids," and further restricting its operation by adding the clause "not elsewhere specially provided for," and at the same time inserting a provision for the first time in tariff legislation for "bindings * * * of cotton" without words of qualification or restriction, clearly expressed its intention to limit the high tax of 60 per cent. to such braids as were not bindings.

Congress provided for cotton bindings for the first time in the law of 1897. What did it have in mind? We turn to a decision of the Board of General Appraisers rendered more than two years prior to the passage of the Act of 1897, to wit, on January 7, 1895, known as G. A. 2850, on a protest of C. M. Vom Baur, the appellant in *Vom Baur vs. U. S.*, 141 Fed., 139, wherein the Board said:

> "The merchandise here is *cotton braid, known as 'seam bindings,'* * * * *that it is used for seam binding;* that it is similar to a feather-stitch braid." (Italics ours.)

The Board recognized that the goods were known as bindings, and used as bindings; in the absence of a provision for bindings, they were held as braids, following the Dieckerhoff case (54 Fed., 161).

Then came the law of 1897, and we answer the question of the learned Judge at Circuit "Did or did not Congress have these things in mind when the Tariff Act of 1897 was passed?" Congress *did* have these things in mind because it inserted into the law an absolute and unqualified provision for "bind-

ings * * * of cotton" and removed what had before been an unqualified and unrestricted provision for "braids," from the *notions* paragraph to the *trimmings* paragraph, but with its scope materially cut down by the addition of the words "not elsewhere specially provided for."

The Board decision in 1895 construed in connection with the change in the Dingley Law in 1897, two and one-half years afterwards, is most significant. For an instance of the great importance attached by this Court to a Board decision in 1894, construed in the light of the succeeding tariff of 1897 (see *Komada & Co. vs. United States*, No. 220, October Term, 1909), involving the classification of a Japanese beverage, known as Saka, decided January 3d, 1910, reported in T. D. 30253.

The Respondent is seeking in the case at bar to have the goods classified under the paragraph in the Act of 1897, according to paragraphs under which they were classfied in the Acts of 1890 and 1894, that is to say, the "notions" paragraph.

The braids which are subject to the high tax of 60 per cent. are those braids which are not bindings. There are, as found by the Circuit Court of Appeals, braids (like Exhibits A and B) which are bindings, and other braids (like Exhibit C) which are not bindings; the former serve chiefly an utilitarian purpose in covering seams or preventing the raveling of raw edges of garments; the other variety are ornamented or decorative and in the nature of trimmings. Such is common knowledge.

Binding: "A braid or strip folded and sewed on the edge of any fabric, or sewed over the place where the parts are joined, so as to protect and secure the parts covered by it."

Standard Dictionary.

Braid: "A narrow flat tape or woven strip for binding the edges of fabrics or for ornamenting them."

Standard Dictionary.

And Congress recognized this distinction, because in enacting the law of 1897, it struck out the word "braids" from the notions paragraph (320), and substituted in its place the word "bindings," and then carried over the word "braids" to the "trimmings" paragraph (339), but said "trimmings, including braids, * * * not elsewhere specially provided for."

In this connection it is most important to note and to have clearly in mind the general scope of paragraph 339 as compared to the general scope of paragraph 320. 339 is distinctively the vegetable fibre trimmings paragraph of the Dingley law providing as it does for insertings, flouncings, nettings, rufflings, ruchings, tuckings, galloons, laces, embroideries, trimmings, etc., the primary or main purpose of which is for the embellishment or ornamentation of dresses or outside garments, which group of articles is handled, broadly speaking, by dealers in trimmings, as distinguished from dealers in notions or small wares; whereas paragraph 320, on the other hand, is distinctively the vegetable fibre notions paragraph of the Dingley law, providing, as it does, for bandings, beltings, bindings, bonecasings, cords, ribbons, tapes, webbing, etc., all of which are primarily or mainly articles of utility, and handled by dealers in notions and small wares. And in this connection it should be noted that all witnesses agree that these goods are carried not in braid or trimming departments but in notion departments.

As the Court below very pertinently said in its opinion :

> "The question is, not whether the articles are braids, but whether they are braids not elsewhere provided for in the act. * * * But these feather-stitch braids, being used for the purpose of binding seams, are, in our opinion, the kind of braids properly called bindings. And we think that it may fairly be assumed that, when Congress inserted the word 'bindings' in the 'notions' paragraph and transferred the word 'braid' to the 'trimmings' paragraph with words of qualification it intended to embrace in the latter paragraph only such braids as were not bindings. If the articles are bindings, as well as braids, the provision in the 'notions' paragraph is the more specific. Bindings are embraced without the words of restriction or qualification. These articles as bindings are necessarily included, and they are specially provided for elsewhere than in paragraph 339."

The soundness of the doctrine that a provision which is absolute and exclusive in its phraseology is of superior governing force to one qualified by the phrase "not else-

wher specifically provided for " has been repeatedly recognized by this Court.

Barber vs. Schell, 107 U. S., 617, 520;
Hartranft vs. Meyer, 135 U. S., 237;
Arthur's Exr's. vs. Vietor, 127 U. S., 572;

The argument of the learned Solicitor General on page 18 of his brief that the words of limitation " not elsewhere specially provided for " should be applied to only some of the articles named in paragraph 339 is fully answered by reference to the statute itself which reads: "all of the foregoing, composed," etc.

V.

The merchandise is bindings in fact, by fabrication, and by use, and being primarily a notion article and not a trimming article, its logical place is in Paragraph 320 and not in Paragraph 339.

(1) By fabrication the goods represented by Exhibits A and B are bindings.

> " The articles in dispute (collective Exhibits A, B & C) are woven on a loom. Tapes and bindings are made that way. Braids are usually made on a braid machine. The manner of making, therefore, leads us towards tapes and bindings in paragraph 320. * * * "
>
> Decision Circuit Court (p. 304).

(2) By ordinary meaning and by use the goods are bindings.

The Standard Dictionary definition of bindings appears on page 12 of this brief.

Spons' Encyclopædia of Industrial Arts, page 1762, defines bindings as follows:

> " Bindings are kindred articles to braids, but usually of rather different texture; the two

SIDES ARE NOT ALIKE, THE FRONT HAVING A DIAGONAL OR HERRINGBONE TWILL, WHILE THE BACK IS PLAIN."

The overwhelming mass of testimony in the case at bar proves that the chief use of these goods, and the main object of applying them, is for binding purposes within these definitions—to sew over the place where two parts are joined (seams), so as to protect and secure the parts, or, as the learned Judge at Circuit put it, " to cover and unite the raw edges." Their chief service is one of utility. The Circuit Court of Appeals in the present case said :

> " But these featherstitch braids, being used for the purpose of binding seams, are, in our opinion, the kind of braids properly called bindings."

On the question of use see

Sonn, fol. 125.
Weiller, fols. 148, 892.
Hyman, fols. 694, 696.
Steinhardt, fols. 554, 862–863.
Hilder, fol. 192.
Yankauer, fol. 214.
Lewit, fols. 249, 257.
Alvis, fols. 275–6.
Miss Forsythe (Gov.), fol. 343.
Williams (Gov.), fol. 389.
Von Baur fol. 472.
Hague (Gov.), fols. 524, 533.
Horrax, fol. 718.
Herman, fols. 733, 738.
Martin, fols. 752–754.
Jacobs, fols. 759–760.

The testimony of ten other witnesses on the subject of use, merely cumulative of the foregoing, is found at folios 94, 101, 178, 229, 419, 421, 694, 742, 875, 882, 902.

To what articles or class of goods, then, can the provision for bindings be more appropriately applied than to the merchandise in suit, represented by Collective Exhibits A and B ?

VI.

If the rule of commercial designation is to apply then the A and B goods by trade practice, trade understanding and trade name are also bindings.

What the Government is really seeking to do here as evidenced by the argument of the Solicitor General in the entire last half of the brief is to have this court review the finding of fact made by the Circuit Court of Appeals that the articles in controversy are "bindings as well as braids."

The learned Solicitor General states on page 13 of his brief:

> "The testimony for the Government is explicit that such articles are not called bindings in the trade. *Every witness called for the government in this case so testified.*"

and then sets forth excerpts from the testimony of seven witnesses on pages 13–15. It is to be noticed that the testimony of six of these seven witnesses (Farrell, Wilson, Forsythe, Stern, Williams and Heaphy) is incompetent. They were all connected with retail New York dry goods stores, and could not therefore testify as to the understanding of the wholesale trade. It is not the usage of the *retail* trade which brings a provision within the rule of commercial designation, but is the understanding of that trade which buys and sells at *wholesale.*

Morrison vs. Miller, 37 Fed. Rep., 82.
Stewart vs. United States (C. C. A.), 113 Fed. Rep., 928.

But a conclusive answer is found in the testimony of other *Government* witnesses who in fact were wholesale dealers as appears from the printed record:

STOCKUM (Gov., fols. 485–6):

Q. What does that say ?
A. The word on there says featherstitch braids but we don't buy these goods as featherstitch braids.
Q. How do you buy them ?
A. Buy them as cotton binding.
Q. Do you order them that way ?
A. We order them that way, buy them that way, as such, and sell them as such.
Q. How are they invoiced to you ?
A. As bindings.

KELLER (Gov., fol. 511):

Q. Is it true they are usually sold and billed as featherstitch braids ?
A. No.
Q. How are they usually known ?
A. Well, they use in my experience with these goods all kinds of names—herringbone binding, seam binding, featherstitch braids, finishing braid, finishing tape, finishing binding—in fact, the three words are synonymous with this class of goods, tape, binding or braid."

HAGUE (Gov., fols. 528–9):

Q. The great bulk of your customers are manufacturers ?
A. No, mostly, the wholesale jobbing trade.
Q. How do they order ?
A. Under various designations.
Q. Which is the most general one that you know of ?
A. Binding.

KRACHEHL (Gov., fol. 562):

Q. Do you know of any term which describes the goods as specifically as featherstitch braids ?
A. Yes, sir.
Q. What is that term ?
A. Seam tape, featherstitch binding, seam covering.

THE EVIDENCE FURNISHED BY THE WHOLESALE DEALERS IN NOTIONS IS OVERWHELMINGLY TO THE EFFECT THAT THE ARTICLES IN SUIT ARE BINDINGS ACCORDING TO TRADE NOMENCLATURE.

BARUCH (fol. 96):

> Q. Would a request, for example, for a complete line of bindings and tapes, especially bindings, be complete without an assortment of goods represented by these two Collective Exhibits A and B?
>
> A. No.

HYMAN (fols. 155, 157):

> Q. Would the term binding and herringbone binding be a narrower and more specific term to cover goods of this character (referring to Collective Exhibit A?
>
> A. Yes.
>
> * * * * * *
>
> Q. The use of goods represented by Exhibit B practically the same as Exhibit A?
>
> A. Yes, sir.

STEINHARDT (fol. 170):

> Q. Would a request for a complete line of samples of bindings and tapes, especially bindings, be complete without the inclusion of featherstitched goods, such as are represented by the Collective Exhibits A and B?
>
> A. No, sir.
>
> See, also, fols. 171, 172, 855, 856, 864.

HILDER (fol. 194):

> Q. Would an order for bindings be complete without the inclusion of samples like the official exhibits?
>
> A. It would not.
>
> See, also, fol. 198.

YANKAUER (fol. 216):

> Q. Would an order for binding in your trade, Mr. Yankauer, be complete without including articles like the official exhibits, not, however, referring to the Exhibit C?
>
> A. No, it would not.

FARMER (fol. 230) :

Q. Would you say that the term binding would more narrowly describe the goods than any other term, more specifically ?

A. I should think so.

VOM BAUR (fol. 475) :

Q. Do you consider as a merchant that it would have been at any time possible to completely fulfill the trade meaning of the term bindings without including these goods ?

A. No.

BERG (fol. 702) :

Q. Referring to a period at and prior to 1897, please state the name or names by which that product was bought and sold in trade ?

A. As long as I have been dealing in it they have been known as seam binding, principally covering up seams.

HARRAX (fol. 728) :

Q. By what names are they usually bought and sold, as I understand you to say ?

A. Seam binding.

NEUBERGER (fol 741) :

Q. Please state the name or names by which at and before 1897, that merchandise was designated among merchants in the markets of this country ?

A. Seam bindings, featherstitching, featherstitch bindings ; half a dozen names I have heard.

Q. You have heard them called featherstitch braids, have you not ?

A. I have.

WEILLER (fols. 897, 898) :

Q. Now if a merchant were to ask for a list of the things which are bindings, could he make a complete

list, adhering to the understanding of trade, without including these featherstitch braids under the list?

A. No.

See also

Ferguson, fol. 417, 418.
Ganong, fols. 867, 868.
Connell, fol. 884.
Klemschmidt, fol. 901, 903.

The only witnesses in this entire record who represented or purchased merchandise for dry goods concerns outside of New York, to wit, for concerns in the South and West, agreed that in those sections the merchandise was generally termed and purchased by their houses under the name of seam bindings or featherstitch bindings.

Fantl, fols. 290–293.
Ferguson, fols. 417–420, 445.

THE OVERWHELMING PREPONDERANCE OF TESTIMONY OF THE MANUFACTURING CONSUMERS AS A CLASS, NAMELY, THE MAKERS OF UNDERGARMENTS, INFANTS' CLOTHING, CAPS, WAISTS, ETC., NINE IN NUMBER, WHO WERE CALLED AS WITNESSES IN THIS CASE, WHO BOUGHT AND USED THE GOODS IN WHOLESALE QUANTITIES, WAS THAT THEY HAD ALWAYS REGARDED THEM IN THEIR TRADE AS BINDINGS

Seven of these nine manufacturers (namely, Gideon, Lewit, Alvis, Herman, Martin, Jacobs and Blaskopf) did not employ the term featherstitch braids in any portion of their testimony, and three of them did not recognize the merchandise at all under the name of featherstitch braids.

Gideon, who handled the goods since 1880, testified that herringbone, featherstitch, herringbone binding and featherstitch binding were the only names he had ever known them by (fols. 180–181).

Lewit, who had used the articles in large quantities for many years, stated in effect that they were regarded in his trade as bindings and not as braids (fols. 252–253, 259).

Alvis, with 24 years' experience, testified that an order for seam bindings or herringbone bindings would be filled by the delivery of goods of this character (fol. 265).

The record points to the fact that "featherstitch braids" is a foreign term, first invented by foreign manufacturers (fols. 513, 514, 148, 156, 164, 195-6, 532-3).

Blaskopf alluded to the merchandise as braid or seam banding rather than bindings, but he referred to it also under the name of "seam binding" (fol. 105), and testified that "finishing tapes" was a name just as generally employed as any of the others that he mentioned (fols. 118, 119). He contrasted plain bindings with fancy bindings (fol. 122). Nowhere in his testimony did he use the term featherstitch braid.

Sonn, in his answers, repeatedly referred to the merchandise as binding or herringbone binding (fol. 134). He admitted some familiarity with the term featherstitch braid, but testified that the term binding would more aptly describe the goods, and that herringbone binding was the most common word used in this country, and that that was the original name (fols. 130-132).

See, also,

Herman, fol. 733.
Martin, fols. 753, 754.
Jacobs, fol. 760.

Not only has it not been shown in the case at bar that, at the time the Act of 1897 was passed and prior thereto, the word "bindings" had a trade signification different from its ordinary meaning (which includes the articles in suit), but it has been affirmatively shown that by recognized trade usage the word "bindings" was one of the commercial names for the articles like Exhibits A and B.

Batterson vs. Magone, 48 Fed. Rep., 289.

The truth is, as a reading of the record will show, that goods represented by Exhibits A and B were known in different trades and in different part of this country under various names, such as seam bindings, featherstitch bindings, featherstitch braids, as well as by other names. Indeed, it is asserted with some confidence that a reading of the record will lead to the conclusion that it is very doubtful if there

was any definite, uniform, and general commercial designation of the goods in suit as featherstitch braids in the trade and commerce of this country within the rule as laid down by this Court in

Maddock vs. Magone, 152 U. S., 368, 371.
Berbecker vs. Robertson, 152 U. S., 372, 376.
Sonn vs. Magone, 159 U. S., 417, 421.
Patton vs. United States, 159 U. S., 500, 506.

VIII.

Supplementing Point IV., the soundness of the respondent's contention is further shown by the history of tariff legislation.

The learned Solicitor General, on page 20 of his brief, states:

> "That cotton 'braids' and 'bindings' are independent enumerations *eo nomine* and stand for different articles is shown beyond a doubt by the tariff of 1909, which provides for braids and bindings in the same paragraph, 349, and makes both dutiable at 60 per cent. ad valorem."

The significance of the changes in phraseology which appear in the Act of 1897 are clearly set forth in the opinion of the Court below. We have already alluded to the fact (Brief, p. 11) that the Board in G. A. 2850 passed upon cotton braids "known as 'seam bindings' and 'used for seam binding,'" and to the definition in Spon's Encyclopaedia (Brief, p. 14) defining bindings as kindred articles to braids. In G. A. 2188, T. D. 14224, the Board of General Appraisers in 1892 also referred to bindings and braids as overlapping or synonymous. Furthermore, it appears that the only parties who asked for high protection on braids at the time the tariff of 1897 was being framed (*i. e.*, the Braid Manufacturers' Association of the United States), did so with reference to braids generally, which they defined as "*the finished product of the*

braiding machine," thus showing very clearly that they, at least, understood " braids " to be, and had in mind when they made their petition for higher duties, *a different class of goods entirely* from the merchandise in suit, to wit, articles made on braiding machines as distinguished from *loom-woven articles* or *bindings* with warp and weft threads (Tariff Hearings before the Committee on Ways and Means, 1896–7, page 1191).

A reference to the Payne Tariff Bill of 1909 (H. R., 1438), shows that as agreed to in the Senate Committee of the Whole and as it went to Conference, Paragraph 328, corresponding to Paragraph 320 of the Act of 1897, here drawn in question, provided for " bandings, beltings, *bindings*, tapes, webs or webbing, *not made on a braiding or other similar machine* * * * 45 per centum ad valorem." This provision (which would seem to show a clear legislative recognition of the fact that there were loom woven bindings like the official Exhibits, and an intent to provide for them at a lower rate as long as they were not made on a braiding machine), was dropped entirely in conference. We find instead in Paragraph 349, as the Solicitor-General states, a provision for " bindings " and " braids " and " featherstitch braids." So far from affording any indication that braids and bindings are inherently independent articles, the tariff law of 1909, viewed in the light of the history of the case, is more in consonance with a change of intent—an intent to classify hereafter at the same rate braids, whether in the nature of bindings, or otherwise, and bindings, whether loom woven, or made on the braiding machine.

Resume.

It is respectfully insisted that—

1. The main if not the only question which the Government is here seeking to have reviewed is a question of fact, namely, whether the articles in controversy are or are not bindings.

2. There is no conflict in decisions of Appellate Courts. The granting of the Government's application would result in bringing before this Court only one decision of a Circuit Court of Appeals.

3. This case is not of such gravity or general importance as to warrant this Court in reviewing the decision of the lower tribunal.

4. The Circuit Court of Appeals was right in holding that paragraph 339 covers only such braids as not elsewhere specially provided for in the Act of 1897, and that the merchandise in suit is more specifically provided for as bindings in paragraph 320.

5. The merchandise is clearly shown by the evidence to be bindings by fabrication, by the ordinary meaning of the term, by use and by trade practice; it is primarily a notion article and not a trimming article, and its logical place is in paragraph 320.

6. The prayer for the issuance of a writ of certiorari should be denied.

January, 1910.

Respectfully submitted,

ALBERT H. WASHBURN,

Counsel for Respondent.

APPENDIX.

BARUCH v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 25, 1909.)

No. 245 (4,419).

CUSTOMS DUTIES (§ 32) — CLASSIFICATION — "BINDINGS" — FEATHERSTITCH BRAIDS.

Braids used as bindings are specially provided for as "bindings" in Tariff Act, July 24, 1897, c. 11, § 1, Schedule I, par. 320, 30 Stat. 179 (U. S. Comp. St. 1901, p. 1661), and, though commercially known as "feather stitch braids," are therefore removed from the provision for "braids * * * not elsewhere specially provided for," in Schedule J, par. 339, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1662).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig., § 32.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 159 Fed., 294.

This is an appeal taken by an importer from a decision of the Circuit Court, Southern District of New York (159 Fed. 294), affirming a decision of the Board of General Appraisers, which affirmed a decision of the collector that certain imported merchandise, consisting of various loom-woven fabrics was duitable as braids under paragraph 339 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule J, 30 Stat., 181 [U. S. Comp. St. 1901, p. 1662]). The merchandise is of three classes, shown in Exhibits A, B, and C. The importer concedes that the broad articles, shown

in Exhibit C, were properly assessed under paragraph 339, but contends that the narrow articles, illustrated in Exhibits A and B, should have been assessed as "bindings" under paragraph 320 of said tariff act.

The two paragraphs in question follow, and, as the development of the legislation is of importance, they are shown in parallel columns with the corresponding paragraphs of the tariff acts of 1890 (Act Oct. 1, 1890, c. 1244, 26 Stat., 567), and 1894 (Act Aug. 27, 1894, c. 349, 28 Stat., 509).

Act of 1890.	Act of 1894.	Act of 1897.
354. Cotton cords, braids, boot, shoe and corset lacings, thirty-five cents per pound; cotton gimps, galloons, webbing, goring, suspenders and braces, and of the foregoing which are elastic or non-elastic, forty per centum ad valorem: Provided that none of the articles included in this paragraph shall pay a less rate of duty than forty per centum ad valorem.	263. Cords, braids, boot, shoe and corset lacings, tapes, gimps, galloons, webbing goring, suspenders and braces, woven, braided or twisted lamp or candle wicking, lining for bicycle tires, spindle binding, any of the above made of cotton or other vegetable fiber and whether composed in part of India rubber or otherwise, forty-five per centum ad valorem.	320. Bandings, beltings, bindings, bone casings, cords, garters, lining for bicycle tires, ribbons, suspenders and braces, tapes, tubing and webs or webbing, any of the foregoing articles made of cotton or other vegetable fiber, whether composed of in part of india-rubber or otherwise, and not embroidered by hand or machinery, forty-five per centum ad valorem; spindle banding, woven, braided or twisted lamp, stove or candle wicking made of cotton or other vegetable fiber, ten cents per pound and fifteen per centum ad valorem; loom harness or healds made of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, fifty cents per pound and twenty-five per centum ad valorem; boot, shoe, and corset lacing made of cotton or other vegetable fiber, twenty-five cents per pound and fifteen per centum ad valorem; labels, for garments or other articles composed of cotton or other vegetable fiber, fifty cents per pound and thirty per centum ad valorem.
373. Laces, edgings, embroideries, insertings, neck rufflings, ruchings, trimmings, tuckings, lace window curtains, and other similar tamboured articles, and articles embroidered by hand or machinery embroidered and hemstitched handkerchiefs, and article made wholly or in part of lace, rufflings, tuckings, or ruching, all of the above-named articles, composed of flax, jute, cotton or other vegetable fiber or of which these substances or either of them or a mixture of any of them is the component material of chief value, not specially provided for in this act, sixty per centum ad valorem: Provided, that articles of wearing apparel, and textile fabrics, when embroidered by hand or machinery, and whether specially or otherwise provided for in this act, shall not pay a less rate of duty than that fixed by the respective paragraphs and schedules of this act upon embroideries of the materials of which they are respectively composed.	276. Laces, edgings, nettings and veilings, embroideries, insertings, neck rufflings, ruchings, trimmings, tuckings, lace window curtains, tamboured articles, and articles embroidered by hand or machinery, embroidered handkerchiefs, and articles made wholly or in part of lace, rufflings, tuckings, or ruchings, all of the above-named articles, composed of flax, jute, cotton, or other vegetable fiber, or of which these substances or either of them, or a mixture of any of them, is the component material of chief value, not specially provided for in this act, fifty per centum ad valorem.	339. Laces, lace window curtains, tidies, pillow shams, bed sets, insertings, flouncings, and other lace articles; handkerchiefs, napkins, wearing apparel, and other articles, made wholly or in part of lace, or in imitation of lace; nets or nettings, veils and veilings etamines, vitrages, neck rufflings, ruchings, tuckings, flutings, and quiltings; embroideries and all trimmings, including braids, edgings, insertings, flouncings, galloons, gorings and bands; wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a letter monogram or otherwise; tamboured or appliqued articles, fabrics or wearing apparel; hem-stitched or tucked flouncings or skirtings, and articles made wholly or in part of rufflings, tuckings or ruchings, all of the foregoing, composed wholly or in chief value of flax, cotton, or other vegetable fiber and not elsewhere specially provided for in this act, whether composed in part of india-rubber or otherwise, sixty per centum ad valorem: Provided that no wearing apparel or other article or textile fabric, when embroidered by hand or machinery, shall pay duty at a less rate than that imposed in any schedule of this act upon any embroideries of the materials of which embroidery is composed.

Bindings appeared for the first time in the act of 1897, when they were inserted in paragraph 320. Braids at the same time were inserted in paragraph 339. In the provisions of the act of 1890 and 1894 the word "braid" appeared without words of limitation. In paragraph 339 it is followed by the restriction "not elsewhere specially provided for in this act." The articles in the paragraphs at the head of the parallel column (paragraph 354 of the act of 1890; paragraph 263 of the act of 1894, and paragraph 320 of the act of 1897) are primarily articles of utility, not inappropriately designated in the brief of the importer as "notions." The other paragraphs embrace articles which are primarily for the purpose of ornamentation.

Comstock & Washburn (Albert H. Washburn, of counsel, and J. Stuart Tompkins and George J. Puckhafer, on the brief), for importers.

J. Osgood Nichols, for the United States.

Before LACOMBE, WARD and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The merchandise in question consists of narrow woven strips bearing "featherstitch" or "herringbone" ornamentation. Their practical use is to cover seams. They are inexpensive, and are largely used in making infants' clothing and underwear. The featherstitch ornamentation improves the appearance of the garment, and is added for that purpose. But the primary purpose of the article is one of utility.

This article has borne various names, such as "seam binding," "featherstitch binding," "featherstitch tape," etc.; but the name by which it has usually been called is "featherstitch braid." Indeed, while the article is not braided, but woven, we should have little difficulty in adopting the conclusion of the Circuit Court and of the Board of Appraisers that prior to 1897 it was generally commercially designated as "featherstitch braid." But this is not a case in which the finding of a commercial designation carries us far. The question is, not whether the articles are braids, but whether they are braids not elsewhere specially provided for in the act. Manifestly commercial designation can have no bearing upon the latter inquiry. It cannot be said that the phrase "braids not otherwise specially provided for"

had any commercial meaning—different from the common understanding—including this merchandise. The articles may be called "featherstitch braids"; but, if some braids are bindings, it is not inconsistent with the commercial designation to assess them under the binding paragraph.

Had this question arisen under the tariff acts of 1890 or 1894, the situation would be entirely different. As we have seen, the word "braid" was used in those acts without words of limitation or qualification. If in a case under either of those acts it had been shown that an article was commercially known as a "braid," it would have necessarily brought it within the statute. But an article is not necessarily brought within paragraph 339 by showing that it is a braid. It may be a braid without question—may have been made upon a braiding machine; but if it is more specially provided for elsewhere, it is not included. Accepting the commercial designation of these articles as featherstitch braids, we only reach the conclusion that they should be classified under paragraph 339 if they are not more specifically provided for elsewhere.

Now, the following definition of the word "binding" appears in the Standard Dictionary:

> "A braid or strip folded and sewed on the edge of any fabric, or sewed over the place where two parts are joined, so as to protect and secure the parts covered by it."

It thus appears that a binding may be a braid used or adapted to be used for a particular useful purpose. Many kinds of braid are not adapted to this use. They are employed for ornamental purposes solely. Braids of this character should be classified under paragraph 339. And, as we have seen, this classification would be especially appropriate, as that paragraph and those corresponding to it in the earlier acts have always applied particularly to articles of ornamentation. But these featherstich braids, being used for the purpose of binding seams, are, in our opinion, the kind of braids properly called bindings. And we think that it may fairly be assumed that, when Congress inserted the word "bindings" in the "notions" paragraph and transferred the

word "braid" to the "trimmings" paragraph with words of qualification, it intended to embrace in the latter paragraph only such braids as were not bindings. If the articles are bindings, as well as braids, the provision in the "notions" paragraph is the more specific. Bindings are embraced without the words of restriction or qualification. These articles as bindings are necessarily included, and they are specially provided for elsewhere than in paragraph 339.

This discussion of the case upon principle leads us to the conclusion that the merchandise should have been assessed for duty as bindings under paragraph 320; and we reach no different result from an examination of other cases, although the question of the classification of this merchandise has been before the courts several times and conflicting decisions have been rendered. In the case of *In re* Dieckerhoff (C. C.) 54 Fed., 161, it was held that these articles were dutiable as cotton braids under the section of the act of 1890 first quoted, and not as cotton trimmings under the second section quoted. This decision, however, has no special bearing upon the question now under consideration because, as we have seen, bindings were not provided for in the act of 1890. Featherstitch braids may well not be trimmings within the ornamental article paragraph of the earlier act and yet be bindings within the useful article paragraph of the act of 1897.

The government, however, insists that in view of the Dieckerhoff decision it must be presumed that, when Congress used the word "braids" in the act of 1897, it intended that it should apply to featherstitch braids. As just pointed out, however, all that that case held was that the articles were braids and not trimmings. It did not hold that they were not bindings. And Congress used the word "braid" only with words of qualification. We see no force in the contention. Aside from the Dieckerhoff decision under the act of 1890 the question here presented has been decided both ways by the Circuit Court. In Steinhart vs. United States (C. C.), 121 Fed., 442, it was held that the articles, if braids, were bindings also, and therefore dutiable under paragraph 320. This decision was followed in The Hague Case which does not appear in the "Federal Reporter." In the case of Von Baur vs. United States (C. C). 141 Fed.,

439, the question was again presented and decided the other way. The opinion of the board holding that the articles were braids under paragraph 339 was affirmed without opinion by the Circuit Court. We find the reasoning in the Steinhart decision persuasive, and, for reasons already stated, fail to find that the additional evidence requires any different conclusion.

The decision of the Circuit Court is reversed.

172 Fed. Rep., 342.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES, PETITIONER,
v.
LEOPOLD BARUCH.
No. 190.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The articles are featherstitch braids, loom woven, of white or colored threads throughout, or of mixed white and variously colored threads, of cotton or other vegetable fiber, and ornamented with raised figures in various designs, some of which have plain and others scalloped or looped edges.

Importer's collective Exhibit A consists of braids with embroidery of herringbone stitches or other patterns; Exhibit B, of braids of approximately the the same widths as A, with scalloped or looped edges in addition to embroidery, and Exhibit C, of braids having plain, looped or lace edges, together with embroidery or openwork, or both, and some considerably wider than either A or B.

9660—11——1

The goods were invoiced as "Cotton featherstitch braids" and were returned by the appraiser as "Cotton braids, sixty per cent." They were accordingly classified by the collector as "braids" under paragraph 339 of the tariff act of July 24, 1897. (R., 7, 8.)

The importer protested against the assessment of duties at the rate of 60 per cent ad valorem, claiming, among other provisions, paragraph 320 of said act, imposing upon "bindings" the rate of 45 per cent ad valorem, as the proper classification. (R., 11, 12.)

The tariff provisions mentioned are as follows:

Paragraph 339:

> Laces, lace window curtains, tidies, pillow shams, bed sets, insertings, flouncings, and other lace articles; handkerchiefs, napkins, wearing apparel, and other articles made wholly or in part of lace or in imitation of lace; nets or nettings, veils and veilings, etamines, vitrages, neck rufflings, ruchings, tuckings, flutings, and quillings; embroideries and all trimmings, including braids, edgings, insertings, flouncings, galloons, gorings, and bands; wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a letter, monogram, or otherwise; tamboured or appliquéed articles, fabrics, or wearing apparel; hemstitched or tucked flouncings or skirtings, and articles made wholly or in part of rufflings, tuckings, or ruchings; all of the foregoing, composed wholly or in chief value of flax, cotton, or other vegetable fiber, and

not elsewhere specially provided for in this act, whether composed in part of india rubber or otherwise, sixty per centum ad valorem: *Provided*, That no wearing apparel or other article or textile fabric, when embroidered by hand or machinery, shall pay duty at a less rate than that imposed in any schedule of this act upon any embroideries of the materials of which such embroidery is composed.

Paragraph 320:

Bandings, beltings, bindings, bone casings, cords, garters, lining for bicycle tires, ribbons, suspenders and braces, tapes, tubing, and webs or webbing, any of the foregoing articles made of cotton or other vegetable fiber, whether composed in part of india rubber or otherwise, and not embroidered by hand or machinery, forty-five per centum ad valorem; spindle banding, woven, braided or twisted lamp, stove, or candle wicking made of cotton or other vegetable fiber, ten cents per pound and fifteen per centum ad valorem; loom harness or healds made of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, fifty cents per pound and twenty-five per centum ad valorem; boot, shoe, and corset lacings made of cotton or other vegetable fiber, twenty-five cents per pound and fifteen per centum ad valorem; labels, for garments or other articles, composed of cotton or other vegetable fiber, fifty cents per pound and thirty per centum ad valorem.

The importer abandoned his claim as to some of the goods. Its extent is indicated by the statement in the opinion of the Circuit Court (R., 189, 190) that—

> At the hearing the importers acquiesced in the board's decision in so far as it related to collective Exhibit C, and were more or less faint-hearted in their attack upon collective Exhibit B. If they can divest themselves for a moment of the influence which self-interest furnishes, they will see that the logic of the situation sweeps collective Exhibit A into the same net.

The Board of General Appraisers overruled the protest (R., 9–18), and its decision was affirmed by the Circuit Court. (R., 189, 190.)

The Circuit Court of Appeals reversed the judgment of the Circuit Court and held that, although the articles are commercially designated as "braids," they are nevertheless dutiable as "bindings." The court states that the braid paragraph is confined to braids that are "not elsewhere specially provided for," and the conclusion is then reached that since there appears "elsewhere" in the tariff act (i. e., in the provision of paragraph 320 for "bindings"), a term which is broad enough, in its dictionary meaning as defined by the Standard Dictionary, to cover these articles, the latter term should govern the classification. (R., 194–198.)

Your petitioner contends that this decision was erroneous, for the following reasons:

1. Featherstitch braids were, at the time of the passage of the tariff act of 1897, commercially known

under the name of "braids." This is not only established by the testimony, but it was found as a fact by the Board of General Appraisers and by the Circuit Court, and is admitted by the Circuit Court of Appeals. Moreover, such was the judicial decision in the litigation on that subject prior to the passage of the act in question.

2. Featherstitch braids are *not* classified by the trade as "bindings." Their trade name is "braids," not "bindings."

3. In the interpretation of tariff acts the commercial designation of an article determines its classification. It therefore is of no importance, if true, that, in its common dictionary sense, the word "bindings" may be broad enough to include these featherstitch braids. Such, however, is not the definition in the standard American dictionaries.

4. The presence of the phrase "not elsewhere specially provided for," in paragraph 399, does not alter the situation. Braids are nowhere specially provided for except in that paragraph. The tariff act has distinguished between "braids" and "bindings." They are separate commodities in the tariff sense as well as in commercial nomenclature.

ARGUMENT.

I.

The history of litigation and of legislation supports the Government's contention that these articles are dutiable as "braids."

Cases involving the dutiable classification of featherstitch braids are as follows:

In re Dieckerhoff (1893), 54 Fed., 161.

Steinhardt v. *United States*, 121 Fed., 442.

Hague v. *United States*, T. D. 25466; 134 Fed., 1022.

Vom Baur v. *United States*, 141 Fed., 439; T. D. 27397, Suit 3640.

Marshall Field & Co. v. *United States*, T. D. 29548, 30299, Suit 2015 (not elsewhere reported).

In the *Dieckerhoff case* the Circuit Court for the Southern District of New York, affirming a decision of the Board of General Appraisers, held that woven featherstitch braids, like the merchandise now in issue, were dutiable as "braids" under paragraph 354 of the tariff act of 1890, providing for "braids." Paragraph 354 of the act of 1890 corresponds in general with paragraph 320 of the act of 1897. [See appendix to this brief for this and other sections in full.]

The contention of the United States was that featherstitch braids were trimmings and were provided for in paragraph 373 of the law of 1890 (corresponding generally with par. 339 of the 1897 act). This was a collector's appeal from the decision of the

board, and upon the testimony of "four representative importers and large dealers in this city (New York)" commercial designation of featherstitch braids "as braids" was upheld.

The Treasury Department, on the advice of the Attorney General, acquiesced in this decision, and extended it to contested importations of featherstitch braids which had been classified as trimmings under the tariff act of 1883. (T. D. 13653, 14124.)

From that time continuously up to the present it has been the uniform practice of the Treasury Department to classify these featherstitch braids as braids. That practice was being constantly pursued at the time of the drafting and enactment of the law of 1897, under which the importations in the case at bar were made.

By familiar rules, therefore, the presumption arises that Congress in 1897 used the word "braids" to designate the same things as in the 1890 act.

In *Steinhardt* v. *United States* (1903) the Circuit Court for the Southern District of New York reversed a decision of the Board of General Appraisers, and held that "narrow woven tapes of cotton, used largely for covering the seams of underwear and waists," were dutiable as bindings or tapes at 45 per cent ad valorem under paragraph 320 of the tariff act of 1897, and not as braids dutiable at 60 per cent ad valorem under paragraph 339.

The court reversed the board's decision on the strength of the definition in the Standard Dictionary that a braid is "a narrow, flat tape or woven strip

for binding the edges of fabrics, or for ornamenting them."

The court in its opinion did not doubt that the articles were the "braids" of paragraph 339 of the act of 1897, but held that under the Standard Dictionary definition they were also "bindings," and hence were "otherwise specially provided for" in paragraph 320. This is, to say the least, amazing logic; it involves the assumption that the clause "not otherwise specially provided for" was mandatory on the court to put no merchandise under paragraph 339, unless on no theory could it be classified elsewhere.

Hague v. *United States* involved the same sort of merchandise, and reached the Court of Appeals for the Second Circuit in 1904, where the appeal was dismissed on the authority of the *Steinhardt case.*

In *Vom Baur* v. *United States* (1905), the Circuit Court for the Southern District of New York, affirming a decision of the Board of General Appraisers, held that featherstitch braids, like those now in issue, produced by a process of weaving and not of braiding, and commercially known as "braids," were dutiable as "braids" under paragraph 339, tariff act of 1897, and not as "bindings" or "tapes" under paragraph 320 of said act. The opinion of the board was full and exact and was adopted by the court as its judgment.

An appeal taken by the importer to the Circuit Court of Appeals was dismissed at the instance of the appellant.

The case was tried after the Treasury Department (T. D. 24269) had limited its acquiescence in the doc-

trine of the Steinhardt case to the very merchandise; and the record included very full evidence of commercial designation; no doubt existed on either side that featherstitch braids were commercially known as "braids"; and the importer was relegated to the argument that while they were braids they were also bindings, and therefore were taken out of paragraph 339. The weakness of that contention, however, is that the proof in the case is all the other way.

In *Marshall Field & Co.* v. *United States,* the Circuit Court for the Northern District of Illinois affirmed a decision of the Board of General Appraisers that featherstitch braids are dutiable at 60 per cent ad valorem under paragraph 339 of the tariff act of 1897.

An appeal to the Circuit Court of Appeals was dismissed, at the request of the importer, after the decision of the Circuit Court of Appeals in the present case.

Hence it is seen that until the decision in the *Dieckerhoff case,* in 1893, articles of the kind in suit, made in the same way and similarly ornamented with herringbone and other patterns, were classified as trimmings at a higher rate of duty than was imposed on braids. In that case, on an importer's protest, it was held that they were commercially known as "braids" and were dutiable accordingly under the tariff act of 1890.

That classification was acquiesced in by the Treasury Department and thereafter followed. Change of tariff made it unfavorable to importers, and it was

successfully challenged by them in the *Steinhardt case*. The Treasury Department, however, continued to classify the articles as braids, with a view of bringing the question again before the courts (T. D. 24269) upon proof of commercial designation, lacking in the Steinhardt case. The matter was fully presented, both on behalf of the importers and of the Government, in *Vom Baur* v. *United States*. Classification as braids was there held to be correct. Then came this case and the *Field case*, the former following the Steinhardt case and the latter the *Vom Baur case*. All of these cases arose under the tariff act of 1897.

In the tariff act of 1909 bindings were put in the same paragraph—349—with braids, and both made dutiable at 60 per cent ad valorem, the rate imposed on braids in the act of 1897. This shows beyond a doubt that for tariff purposes braids and bindings are independent enumerations and stand for different articles; and answers fully the argument which is advanced, that the braids of paragraph 339, act of 1897, are specially provided for as "bindings" in paragraph 320 of that act and are therefore dutiable there.

Analogous conditions make pertinent the reasoning of this court in *Komada* v. *United States* (215 U. S., 392, 396–398). In that case Mr. Justice Brewer, speaking for the court, said:

> Thus it appears that prior to 1894 sake was classified by similitude to distilled liquor, and then on a protest by an importer it was classified by similitude to still wine, and that ruling

has been followed from that time to the present, receiving in the meantime at least a qualified approval by Congress. It was accepted without challenge until 1902. Then, a protest against it having been overruled, it remained unchallenged for another year. After this, and in the latest tariff act, Congress has in terms put sake in the category with still wines.

Under these circumstances we think the intent of Congress in respect to the classification of sake is clearly manifested, and the judgment of the Court of Appeals is affirmed.

Long-continued executive practice and implied adoption thereof by Congress were considerations in that case, as in this. Among the cases therein cited is *United States* v. *Cerecedo* (209 U. S., 337, 339). in the decision of which Mr. Justice (now Chief Justice) White and Mr. Justice Peckham concurred solely because of such practice.

II.

It has long been a settled rule of interpretation that if words used in a statute imposing duties on imports had at the time of its passage a well-known signification in our trade and commerce, differing from their ordinary meaning, the commercial designation must prevail, unless Congress has clearly manifested a contrary intention; and it is only when no commercial usage is called for or proved that the common meaning is to be adopted.

This is a long-established rule of first rank and controlling effect in the construction of tariff laws. One of the earliest cases is *United States* v. *Two*

Hundred Chests of Tea (9 Wheat., 430, 438, 439). The question there was whether certain tea imported in 1819 was bohea, as entered. Mr. Justice Story, delivering the opinion of the court, said:

> The object of the duty laws is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of trade. Whether a particular article were designated by one name or another, in the country of its origin, or whether it were a simple or mixed substance, was of no importance in the view of the legislature. It did not suppose our merchants to be naturalists, or geologists, or botanists. It applied its attention to the description of articles, as they derived their appellations in our own markets, in our domestic as well as our foreign traffic. And it would have been as dangerous as useless to attempt any other classification than that derived from the actual business of human life. Bohea tea, then, in the sense of all our revenue laws, means that article which, in the known usage of trade, has acquired that distinctive appellation.

In 1845, Mr. Chief Justice Taney declared that the principle had become so firmly established that the question could no longer be considered open. (*Curtis* v. *Martin*, 3 How., 105, 109, 110.)

He said:

> The question brought up by this exception can not now be considered as an open one. In the case of the *United States* v. *200 Chests of Tea*, 9 Wheat., 438, the court decided that in im-

> posing duties Congress must be understood as describing the article upon which the duty is imposed according to the commercial understanding of the terms used in the law, in our own markets. This doctrine was reaffirmed in the case of the *United States* v. *112 Casks of Sugar*, 8 Pet., 277, and again in 10 Id., 151, in the case of *Elliott* v. *Swartwout*. It follows that the duty upon cotton bagging must be considered as imposed upon those articles only which were known and understood as such in the commerce in the year 1832, when the law was passed imposing the duty.

Cases reaffirming this doctrine and applying it to various tariff provisions are as follows:

Arthur v. *Morrison* (96 U. S., 108, 111, 112):

In this case the earlier decisions were reviewed and veils manufactured of silk, commercially known as crêpe veils, were held not dutiable as silk veils but as manufactures of silk. The court adverted to the act of 1875 (*infra*), expressly excepting the rule of commercial designation, as showing that in the absence of such clear expression of legislative intent the rule must prevail.

Arthur v. *Butterfield* (125 U. S., 70, 75):

The question was whether certain goat-hair goods were known in commerce under the name of "women's and children's dress goods." Mr. Justice Field said:

> The finding of the jury is conclusive that they were not known in commerce, among merchants and importers, as women's and children's dress goods. It is well settled that

> a designation of an article of commerce by merchants and importers, when clearly established, determines the construction of a revenue law when that article is mentioned. It was so held in *Arthur* v. *Morrison* (96 U. S., 108), and in many other cases, which are cited in the opinion of the court in that case. In *Elliott* v. *Swartwout* (10 Pet., 137, 151), the court said that "laws imposing duties on importations of goods are intended for practical use and application by men engaged in commerce; and hence it has become a settled rule in the interpretation of statutes of this description to construe the language adopted by the legislature, and particularly in the denomination of articles, according to the commercial understanding of the terms used. This rule is fully recognized and established by this court in the case of *Two Hundred Chests of Tea*, reported in 9 Wheat., 438.

Robertson v. *Salomon* (130 U. S., 412, 415):

The question was whether white beans were dutiable as vegetables or free as seeds not otherwise provided for under the tariff act of 1883. The court said:

> The commercial designation, as we have frequently decided, is the first and most important designation to be ascertained in settling the meaning and application of the tariff laws. (See *Arthur* v. *Lahey*, 96 U. S., 112, 118; *Barber* v. *Schell*, 107 U. S., 617, 623; *Worthington* v. *Abbott*, 124 U. S., 434, 436; *Arthur's Executors* v. *Butterfield*, 125 U. S., 70, 75.)

This decision was approved in *Sonn* v. *Magone* (159 U. S., 417, 422), in which substantially the same issue was presented.

American Net & Twine Co. v. *Worthington* (141 U. S., 468, 471, 472):

Linen thread, differing not in material, quality, or mode of manufacture from other similar thread, but intended to be used in the manufacture of gill-nets, was held dutiable as gilling twine under the tariff act of 1883 because commercially known as such. Mr. Justice Brown said:

> It is a cardinal rule of this court that, in fixing the classification of goods for the payment of duties, the name or designation of the goods is to be understood in its known commercial sense, and that their denomination in the market when the law was passed will control their classification without regard to their scientific designation, the material of which they may be made or the use to which they may be applied. (*Two Hundred Chests of Tea*, 9 Wheat., 430, 438; *United States* v. *One Hundred and Twelve Casks of Sugar*, 8 Pet., 277; *Elliott* v. *Swartwout*, 10 Pet., 137; *Curtis* v. *Martin*, 3 How., 106; *Arthur* v. *Morrison*, 96 U. S., 108; *Swan* v. *Arthur*, 103 U. S., 597; *Schmieder* v. *Barney*, 113 U. S., 645; *Arthur* v. *Butterfield*, 125 U. S., 70; *Robertson* v. *Salomon*, 130 U. S., 412.)

Hedden v. *Richards* (149 U. S. 346, 348, 349).

The question was whether certain furniture was dutiable as "furniture finished" under the tariff act of 1883. The collector of customs offered testimony

to show that in the furniture trade the word "finished" had a particular trade meaning, and the court below refused to permit the application of such meaning, if it should be found to exist, to the words as used in the act. Mr. Justice Shiras said:

> The question is, therefore, whether, if a term used in a tariff law has a general meaning, as understood by society at large, and also a special trade signification, it is to be presumed that Congress used the word in its general sense, or in its trade sense.
>
> With regard to the language of commerce, the general rule laid down by this court is that it must be construed, when used in laws imposing duties on importations of goods, and particularly when employed in the denomination of articles, according to the commercial understanding of the terms used. (*United States* v. *One Hundred and Twelve Casks of Sugar*, 8 Pet. 277; *Elliott* v. *Swartwout*, 10 Pet. 137.)

Cadwalader v. *Zeh* (151 U. S. 171, 176):

The question there was whether certain small earthenware cups, saucers, and plates, having on them letters of the alphabet and figures of animals and the like, were dutiable as earthenware or as toys under the tariff act of 1883. Mr. Justice Gray said:

> It has long been a settled rule of interpretation of the statutes imposing duties on imports that if words used therein to designate particular kinds or classes of goods have a well-known signification in our trade and commerce, different from their ordinary meaning

> among the people, the commercial meaning is to prevail unless Congress has clearly manifested a contrary intention; and that it is only when no commercial meaning is called for or proved that the common meaning of the words is to be adopted. (*United States* v. *Chests of Tea*, 9 Wheat., 430, 438; *Tyng* v. *Grinnell*, 92 U. S., 467; *Arthur* v. *Butterfield*, 125 U. S., 70; *Robertson* v. *Salomon*, 130 U. S., 412, 415; *American Net & Twine Co.* v. *Worthington*, 141 U. S., 468; *Toplitz* v. *Hedden*, 146 U. S., 252; *Nix* v. *Hedden*, 149 U. S., 304.) Among the words to which this rule has been applied are "refined sugar" (*Barlow* v. *United States*, 7 Pet., 404), "sugar" and "sirup" (*United States* v. *Casks of Sugar*, 8 Pet., 277), "wool" and "worsted" (*Elliott* v. *Swartwout*, 10 Pet., 137), "cotton bagging" (*Curtis* v. *Martin*, 3 How., 106), "silk veils" (*Arthur* v. *Morrison*, 96 U. S., 108), "bar iron" (*Worthington* v. *Abbott*, 124 U. S., 434), "furniture finished" (*Hedden* v. *Richards*, 149 U. S., 346).

De Jonge v. *Magone* (159 U. S., 562, 569):

Papers coated, colored, and embossed to imitate leather, and papers coated with flock to imitate velvet, were classified as paper under the tariff act of 1883. The importers excepted to the charge of the court, "Was this article, in the trade and commerce of this country, when Congress legislated in 1883, a variety of paper?" Mr. Justice (now Chief Justice) White said:

> It follows from what has been stated that the court rightly refused the charges requested by plaintiffs in error. It equally follows that if

> the word "paper" had a well-known signification in trade and commerce in 1883, which embraced these products, that meaning would control. (*Cadwalader* v. *Zeh*, 151 U. S., 171, p. 176.) This principle clearly authorized the court to submit to the jury the question: "Was this article, in the trade and commerce of this country, when Congress legislated in 1883, a variety of paper?" and to instruct them, in the event they answered the question in the affirmative, to find in favor of the collector.

Goat and Sheepskin Import Company v. *United States* (206 U. S., 194, 202, 203):

The question was whether the word "wool," as used in the tariff act of 1897, included a substance which, while the growth upon a sheepskin, was, nevertheless, commercially known as "mocha hair." Mr. Justice Peckham said:

> It is not denied that the commercial designation of an article, which designation was known at the time of the passage of a tariff act, is the name by which the article should be classified for the payment of duty, and, as is stated, "without regard to their scientific designation and material of which they may be made or the use to which they may be applied." (*Two Hundred Chests of Tea*, 9 Wheat., 430, 438; *Arthur* v. *Morrison*, 96 U. S., 108; *American Net and Twine Co.* v. *Worthington*, 141 U. S., 468; *Hedden* v. *Richard*, 149 U. S., 346, 348.) As was said by Mr. Justice Story in *Two Hundred Chests of Tea*, *supra*, Congress did not "suppose our merchants to be natural-

ists or geologists or botanists. It applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as our foreign traffic." And in *Hedden* v. *Richard, supra*, it was said: "The language of commerce * * * must be construed, * * * particularly when employed in the denomination of articles, according to the commercial understanding of the terms used." The commercial designation should prevail, unless Congress has clearly manifested a contrary intention. (*Cadwalader* v. *Zeh*, 151 U. S., 171, 176.)

III.

A legislative intention to take the braids in suit out of the operation of the principle that commercial designation controls classification is not clearly manifested; therefore the principle must apply.

A clear expression of legislative intention to make merchandise dutiable without regard to the principle of commercial designation is found in the first section of the tariff act of 1875 (18 Stat., 307, c. 36), which subjected to a duty of 60 per cent "all goods, wares, and merchandise not otherwise herein provided for, made of silk, or of which silk is the component material of chief value, irrespective of the classification thereof for duty by or under previous laws or of their commercial designation." This exceptional legislation was considered in *Arthur* v. *Morrison* (*supra*), where the cases enunciating the doctrine of classification according to commercial designation were reviewed and applied under the tariff act of 1864 to

silk veils commercially known as "crêpe veils." Mr Justice Hunt said, at pages 111 and 112:

> That Congress intended duties under the act of 1864 to be imposed according to their commercial designation, and that it understood this to be the rule of construing statutes, is also manifest from the first section of the act of February 8, 1875 (18 Stat., 307), upon the subject we are considering.
>
> A duty of 60 per cent is there imposed "on all goods, wares, and merchandise, not herein otherwise provided for, made of silk, or of which silk is the component material of chief value, irrespective of the classification thereof for duty by or under previous laws, or of their commercial designation." It was, no doubt, within the power of Congress to abolish a well-known rule of construction, as it did in the act of 1875; but, until so abolished, it remained in force.

This well-known rule of construction was not "abolished" in the act of 1897. Paraphrasing the language in the Morrison case, "not being so abolished, it remains in force."

There is nothing in the tariff act of 1897 taking any articles commercially known as "braids" out of paragraph 339 and relegating them to paragraph 320 under the name of "bindings." The words of limitation in paragraph 339 do not effect this. The limitations are expressed in the following clause:

> * * *; all of the foregoing, composed wholly or in chief value of flax, cotton, or other vegetable fiber, and not elsewhere specially provided for in this act, whether composed in part of india rubber or otherwise, * * *.

The two phrases "composed wholly or in chief value of flax, cotton, or other vegetable fiber," and "not elsewhere specially provided for in this act," will be considered separately.

1. The phrase "composed wholly or in chief value of flax, cotton, or other vegetable fiber" does not change "braids" from a denominative to a descriptive term, nor serve to take out of paragraph 339 articles commercially known as "braids."

The requirement that the articles covered by paragraph 339 shall be composed of flax, cotton, or other vegetable fiber, does not make "braids" a descriptive rather than a denominative term. The provision is a common form of *eo nomine* enumeration in the several schedules of tariff acts. There is no question as to the component material. It is admittedly vegetable fiber. The only question is, Are the articles "braids"? The word is clearly no less denominative than "bohea tea," "cotton bagging," "silk veils," "gilling twine," "furniture finished," "women's and children's dress goods," and other terms to which the rule of commercial designation was applied by this court in cases *supra*.

But regarded as a descriptive term, the rule as to commercial designation still would apply. It has been repeatedly held that a descriptive term may have a commercial meaning which differs from the ordinary meaning, and that the former must govern.

Arthur v. *Cumming*, 91 U. S., 362, 363.
Pickhardt v. *Merritt*, 132 U. S., 252, 255–257.
Bogle v. *Magone*, 152 U. S., 623, 627.
Cadwalader v. *Zeh*, *supra*.
United States v. *Nordlinger*, 121 Fed., 690, 692, C. C. A.

In *Arthur* v. *Cumming* the clause of the tariff act of 1872, interpreted, was:

> On all burlaps and like manufactures of flax, jute, or hemp, * * *, except such as may be suitable for bagging for cotton, * * *

Mr. Justice Swayne, speaking for the court, said:

> The rule to be followed in the construction of revenue statutes in cases like this is well settled in this court. It is that descriptive terms applied to articles of commerce shall be understood according to the acceptation given to them by commercial men in our own ports at the time of the passage of the act in which they are found.

The terms interpreted in *Pickhardt* v. *Merritt* were "aniline dyes" in the tariff act of 1864 and "aniline dyes and colors by whatever name known" in the tariff act of 1870. The importer insisted that the court erred in admitting evidence to show the signification of the words "aniline dyes and colors" as a commercial term in contradistinction to a descriptive term and in refusing to charge the jury "that the term 'aniline dyes and colors by whatever name known' is not used in a general commercial sense, but as a descriptive term and primarily includes only such dyes as are in fact aniline by their constitution."

This court declared these objections untenable and that the jury was properly instructed that if the articles in question according to commercial under-

standing were included in the class of articles known as aniline dyes they were subject to duty as such.

In *Bogle* v. *Magone* the Circuit Court was adjudged in error in excluding the test of evidence as to whether the term "sauces of all kinds" in the tariff of 1883 had a restrictive trade meaning and was not a descriptive term of ordinary use to be taken in its ordinary meaning. It was said (p. 627):

> The Circuit Court, in directing a verdict for the defendant, ruled, in substance, that as matter of law and without regard to commercial usage these articles came within the words "sauces of all kinds" in the tariff act. We are unable to concur in that view, or to say, either of our judicial knowledge or in view of the evidence introduced, that these articles are necessarily "sauces" of any kind; still less, that this is so clear as to exclude the usual test of commercial designation. (*Cadwalader* v. *Zeh*, 151 U. S., 171, 176.)

Cases cited on behalf of the collector in *Cadwalader* v. *Zeh* (*supra*) were examined and found to have no "tendency to shake this rule." All were declared to depend on special provisions of the statutes. The one most nearly in point here is *Barber* v. *Schell* (107 U. S., 617, 621).

That case involved the question whether the tariff act of 1857 changed the rate of duty imposed in the tariff act of 1846 on certain cotton goods. The latter act contained a provision for "cotton laces, cotton insertings, cotton trimming laces, cotton laces and braids," and for "manufactures composed wholly of

cotton, not otherwise provided for." The act of 1857 provided that "all manufactures composed wholly of cotton, which are bleached, printed, painted, or dyed, and delaines," should be subject to a rate of duty lower than that imposed in the act of 1846.

The importer contended that as cotton laces and cotton insertings were made dutiable by those names in the act of 1846, they were not affected by the subsequent general provision for manufactures composed wholly of cotton. This court, however, said that "cotton" before "laces, etc.," was used as a descriptive word to indicate manufactures composed wholly of cotton, which were clearly comprehended by the provision in the act of 1857 for "all manufactures composed wholly of cotton." As was there said, no question of commercial designation arose in that case.

The court said in *Cadwalader* v. *Zeh*, at page 178:

> In *Barber* v. *Schell* (107 U. S., 617, 621) the words held not to be affected by commercial usage were "all manufactures composed wholly of cotton, which are bleached, printed, painted or dyed." (Act of Mar. 3, 1857, c. 98, sec. 2; 11 Stat., 193.) That designation, as observed by Mr. Justice Blatchford, speaking for this court, and following the decision of Mr. Justice Nelson in *Reimer* v. *Schell* (4 Blatch., 328), was a designation of articles by special description of quality or material, as contradistinguished from designation by a commercial name.

A later case construing a provision like "all manufactures composed wholly of cotton" in *Barber* v.

Schell (*supra*), is *United States* v. *Klumpp* (169 U. S., 209, 212, 216). The provision there in issue was paragraph 297 of the tariff act of 1894 reducing the duties on "manufactures of wool," which was held to embrace worsted, a form of wool, as well as woolen goods. As Mr. Chief Justice Fuller said, "worsted goods are made out of wool, and are necessarily a manufacture of wool." The only question was, Is worsted wool?

In *Seeberger* v. *Cahn* (137 U. S., 95, 98), therein cited, this court said of cloths *popularly* known as "diagonals" and *denominated in trade* "worsteds":

> It being distinctly found, as matter of fact, that the goods in question are called or known in the trade as "worsteds," and are composed mainly of worsted, but mixed with a small proportion of shoddy and of cotton, the Circuit Court rightly held that they were subject to duty as manufactures of worsted, and not as manufactures of wool.

A case accentuating the distinction between a provision imposing duty upon an article by specific designation, such as "braids," which obviously involves the test of commercial usage, and words of special description making the mere existence of particular conditions or facts the basis of classification, is *Patton* v. *United States* (159 U. S., 500, 510).

Mr. Justice Brown there said:

> The act does not impose a duty on scoured wool as such by its commercial designation, but provides that "the duty on wools * * * which shall be imported washed, shall be twice

> the amount of duty to which they would be subject if imported unwashed; and the duty on wools of all classes which shall be imported scoured shall be three times the duty to which they would be subjected if imported unwashed." In short, the act refers not to the commercial designation but to the fact whether the wool has been actually scoured or washed, or is imported unwashed. If the wools have in fact undergone the process of scouring, they are properly classified as imported scoured, although they may not be known commercially as scoured wools.

A provision like paragraph 339 of the tariff act of 1897 was construed and declared to be a specific enumeration subject to the rule of commercial designation in *Arthur* v. *Davies* (96 U. S., 135, 136). In that case, braces or suspenders of rubber, cotton, and silk, cotton chief value, were held dutiable under section 22 of the tariff act of 1861, which read:

> Braces, suspenders, webbing, or other fabrics, composed wholly or in part of india rubber, not otherwise provided for—

And not as "manufactures of india rubber, silk, and other materials." Mr. Justice Hunt said:

> It thus appears that for 30 years prior to this importation, and in four different statutes, braces and suspenders, composed wholly or in part of india rubber, had been a subject of duty, *eo nomine;* and in the same statute where a duty of 50 per cent is imposed on other manufactures of which rubber is a component material, which it is now sought to apply to

braces and suspenders, braces and suspenders containing that material are, by name, charged with an additional duty of 5 per cent.

It is not material that in one kind of suspenders cotton was the component of chief value, and that each contained some proportion of silk. If they are technically and commercially braces and suspenders composed in part of india rubber, they take their dutiable character from that source, * * *.

The rule that commercial designation controls classification is not rendered inapplicable by the phrase "not elsewhere specially provided for" in paragraph 339, tariff act of 1897, and its absence from paragraph 320 of said act.

It does not follow from the use of the phrase "not elsewhere specially provided for" in paragraph 339 of the tariff act of 1897, that some *braids* are elsewhere specially provided for. Application of the phrase to the enumerations *eo nomine*, such as "braids," is unnecessary to give it effect. The phrase may be applied to the general provisions in the paragraph, such as "articles or fabrics embroidered in any manner * * * tamboured or appliquéed articles, fabrics or wearing apparel; hemstitched or tucked flouncing or skirtings, and articles made wholly or in part of rufflings, tuckings, or ruchings." The fact that the words of limitation are applicable to *some* of the articles named in that paragraph does not require a search to be made elsewhere in the act for more specific designation of articles provided for *eo nomine*.

The phrase, furthermore, was not inserted in the law concurrently with the transfer of the provision

for braids from one paragraph to another. It was already in the latter and not in the former. No change whatever was made in that regard. The word "braids" was simply put in a different setting which happened to have the words "not elsewhere specially provided for," while the old one did not.

But irrespective of that, commercial designation fixes the dutiable character of the articles notwithstanding the phrase "not elsewhere specially provided for." This court so held in *Arthur* v. *Lahey* (96 U. S., 112, 118). In summing up the conclusions there reached, the court said:

> 1. The commercial designation of an article among traders and importers, when clearly established, fixes its character for the purpose of the tariff laws.
>
> 2. When Congress has designated an article by its specific name, and imposed a duty upon it by such name, general terms in a subsequent act or in a later part of the same act, although sufficiently broad to comprehend such article, are not applicable to it.
>
> 3. That the expression "not otherwise provided for" in the eighth section of the act of 1864 does not deprive these rules of their ordinary application.

See also *United States* v. *Schwarz* (140 Fed., 302); *Thomas* v. *Schwarz* (140 Fed., 989).

The principle adopted by the Court of Appeals is, it is respectfully insisted, in direct conflict with the rule here stated. The evidence shows, and the Board of General Appraisers, the Circuit Court, and

also the Court of Appeals have all found that the merchandise in question is "featherstitch braid;" and "braid" is specifically provided for by name in paragraph 339 of the tariff act of 1897. On the other hand, "braid" is not mentioned in paragraph 320 of that act, but the Court of Appeals found, by referring to one dictionary, that the word "binding" might include a form of braid, and hence held that it was "specially provided for" there. It is difficult to perceive how it was there "specially provided for," when it had to be spelled into the provision for "bindings" by the use of a dictionary. The word "specially," as here used, must mean something more definite than as held by the court. If such a rule should be applied generally to tariff provisions, it would render almost impossible efficient administration of the law, and the designation of an article by name in a paragraph with such words of limitation would mean practically nothing, as one would have to take his dictionary in hand and turn to the other paragraphs to ascertain whether there might not be a word elsewhere which would embrace it.

That the adoption of such a rule of interpretation would be unfortunate is shown by the fact that the result would sometimes depend upon what dictionary might be consulted by the court. This is well illustrated by the present case: The Court of Appeals relies upon the Standard Dictionary definition of "binding" as a "braid" which secures the edge of cloth from raveling, whereas the definition given by Webster, Worcester, and the Century Dictionaries

(*infra*) is "something" that secures the edge of cloth from raveling, and the word "braid" is not used at all.

The acceptance of a definition in one standard dictionary to the exclusion of others is decisively disapproved in *Koechl* v. *United States* (84 Fed. 448, C. C. A.). Lacombe, C. J., referring to the definition of "vaccine" in the Century Dictionary, said:

> The quotation expresses merely the opinion of the compiler or compilers of the dictionary, and it would certainly require more than the mere ipse dixit of a contributor to such a work to satisfy us that the words "vaccine virus" are actually used with such meaning by educated people; especially in view of the fact that none of the other standard dictionaries—Webster, Worcester, Funk and Wagnalls, etc.—give any such definition of the phrase.

IV.

The articles are not bindings as well as braids, in trade, ordinary, or tariff meaning, and, therefore, are dutiable at 60 per cent ad valorem under paragraph 339, as held by the Board of General Appraisers and the Circuit Court, and not at 45 per cent ad valorem under paragraph 320, as held by the Circuit Court of Appeals.

The action of the collector is presumptively correct. The burden is upon the protesting importers to establish their contention.

Arthur v. *Unkart*, 96 U. S., 118, 122.
Earnshaw v. *Cadwalader*, 145 U. S., 247, 262.
Erhardt v. *Schroeder*, 155 U. S., 124, 130.
United States v. *Ranlett*, 172 U. S., 133, 146.

The collector classified the articles as braids. The importer claims that they are bindings. The collector's classification must stand unless the importer establishes that the articles are bindings and not braids for tariff purposes.

There is evidence that such articles are sold in the braid or trimming department of some establishments (R. 66, 70, 71), although that is not a determinative factor. The matter in issue is not the name of the counter of a retail store where the article is sold, but the name of the article itself as bought and sold at wholesale. Whether sold with trimmings, or with other braids, or with plain, unornamented articles, such as tapes or bindings, is unimportant, if the articles be designated in the wholesale trade as braids.

It is also immaterial how the braids were manufactured, whether woven on a loom or made on a braiding machine. The primary and controlling question is not the name of the machine making the goods, nor the particular method of fabrication, but the commercial designation of the *product when imported*. The law concerns the imported article only and the *eo nomine* provision includes everything known by that name. This is the recognized construction and practice of the Treasury Department for more than a quarter of a century (T. D. 6733, 9415), and is in complete harmony with the decisions of this and of other courts, including the Circuit Court of Appeals in this case, that the mode of manufacture will not avail in determining dutiable classification as against a commercial usage.

Representative cases in this court are:

Merritt v. *Welsh*, 104 U. S., 694, 701, 705.

Chew Hing Lung v. *Wise*, 176 U. S., 156, 160–162.

Merritt v. *Welsh* involved the method of manufacture of sugar. Mr. Justice Bradley, delivering the opinion of the court, said:

> Great stress is laid on the charge that sugars are manufactured in dark colors on purpose to evade our duties. Suppose this is true; has not a manufacturer a right to make his goods as he pleases? If they are less marketable it is his loss; if they are not less marketable who has a right to complain? If the duties are affected, there is a plain remedy. Congress can always adopt such laws and regulations as it may deem expedient for protecting the interests of the Government.
>
> * * * * *
>
> The argument that the sugars in question are not "sugars" in the sense of the law, because the standard adopted by the law for fixing the grade is, as to the sugars in question, defective in its application, is too metaphysical to be of weight in the consideration of the question. They are sugars of commerce, and the complaint of the customhouse is that they are better sugars than they appear to be.

In *Chew Hing Lung* v. *Wise* (*supra*), tapioca flour, one of three forms of tapioca known to commerce, was held not dutiable under the Tariff Act of 1890 as starch, but free of duty as tapioca because commercially so known. Mr. Justice Peckham said:

> Being in truth tapioca, and commercially known as such, it does not come under the description of starch, although in great part composed of that substance. The commercial designation of an article is the first and most important thing to be ascertained, and governs in the construction of the tariff law when that article is mentioned, unless there is something else in the law which restrains the operation of this rule. (*Arthur* v. *Morrison*, 96 U. S., 108; *Arthur* v. *Lahey*, 96 U. S., 112; *Arthur* v. *Rheims*, Id., 143; *Robertson* v. *Salomon*, 130 U. S., 412; *Bogle* v. *Magone*, 152 U. S., 623.)

The mode of fabrication of braids and of similar merchandise was directly in issue in *In re Dieckerhoff* and *Vom Baur* v. *United States* (*supra*), and in the following cases:

> *United States* v. *Field*, 50 Fed. 908, C. C.; 54 Fed. 367, C. C. A.
>
> *United States* v. *Wright*, T. D. 13707 and 13974 (not elsewhere reported).
>
> *Wolff* v. *United States*, 116 Fed. 1023.

In re Dieckerhoff and *Vom Baur* v. *United States* are sustained by the Webster, Century, and Standard definitions of "braid" as including woven products.

In *United States* v. *Field* silk goods which, although made on lace machines and having the substantial characteristics of lace, were not commercially known as laces, but as "silk nets," "veilings," and "drapery nets," were held dutiable under the tariff act of 1890 as manufactures of silk and not as silk laces.

In *United States* v. *Wright* and in *Wolff* v. *United States* cotton tapes made on braiding machines but not commercially known as braids, were held not dutiable as braids.

These cases are in accord with the decision of this court in *Goat and Sheepskin Import Co.* v. *United States* (*supra*), in which it was held that the hair of Mocha sheep, not being commercially known as wool, should not be classified as wool simply because it grows on a sheep.

There can be no doubt that commercial designation as featherstitch braids is established for the merchandise in the case at bar. The testimony clearly shows it (R., 21, 24, 32, 34, 41, 62, 64, 69, 70, 73, 74, 79, 81, 84–86, 98, 165, 166, 174, 185, 188); the Board of General Appraisers and the Circuit Court so found and held, and the Circuit Court of Appeals admits it, but nevertheless classified them as bindings.

The record includes the evidence in the Vom Baur (R., 94–176) and Steinhardt (R., 95, 176–188) cases and part of the Dieckerhoff (R., 155–160). No additional evidence was taken before the board, which quoted and adopted its opinion in the Vom Baur case, wherein the testimony was reviewed and the following finding of facts made (R., 17):

On this record we find as matter of fact—

> 1. That the goods in question were generally known in the wholesale trade of the United States at and prior to July 24, 1897, as "featherstitch braids."

2. That the term "featherstitch braids" was the only general commercial name under which the goods were known in the trade and commerce of this country at and immediately prior to July 24, 1897, and that the terms "seam bindings," "finishing tapes," and others are subordinate names which have not been generally employed to designate these goods.

In view of these findings, we think the case is distinguished from the *Steinhardt case* (*supra*). That case only decided that if the articles were braids within the lexicographical definitions they were also bindings or tapes, and were therefore more specifically provided for in paragraph 320. There was no satisfactory testimony in the case as to the commercial designation of the articles, whereas it has now been shown by competent testimony that they are generally known in the commerce of this country as "braids" and not as "tapes" or "bindings."

Voluminous testimony was taken in the Circuit Court, which said in part (R., 189):

> The board found that these goods were known generally in the trade as featherstitch braids prior to 1897. The further testimony taken in court does not tend to weaken that conclusion; in truth, it serves to strengthen it.

The Circuit Court of Appeals said in part (R., 197):

> This article has borne various names, such as "seam binding," "featherstitch binding," "featherstitch tape," etc., but the name by which it has usually been called is "featherstitch braid." Indeed, while the article is

> not braided but woven, we should have little difficulty in adopting the conclusion of the Circuit Court and of the Board of Appraisers that prior to 1897 it was generally commercially designated as "featherstitch braid."

This concurrence of the Appellate Court in the finding of the board and of the Circuit Court is conclusive of the fact that the articles are commercially known as braid; it is a settled doctrine of this court that the concurring decisions of two courts upon a question of fact will be followed unless wholly unwarranted. A conflict in the testimony is insufficient ground for disturbing such finding.

> *Dravo* v. *Fabel*, 132 U. S., 487, 490.
> *Stuart* v. *Hayden*, 169 U. S., 1, 14.
> *Baker* v. *Cummings*, 169 U. S., 189, 198.
> *Beyer* v. *LeFevre*, 186 U. S., 114, 119.
> *The Carib Prince*, 170 U. S., 655, 658.
> *Shappirio* v. *Goldberg*, 192 U. S., 232, 240.
> *The Iroquois*, 194 U. S., 240, 247.
> *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U. S., 401, 412.
> *United States* v. *Clark*, 200 U. S., 601, 608.

In *Beyer* v. *LeFevre*, Mr. Justice Brewer, delivering the opinion of the court, said:

> * * * it is well settled that when the trial and the appellate courts agree as to the facts established on the trial, this court will accept their conclusion *and not attempt to weigh conflicting testimony.* *Stuart* v. *Hayden* (169 U. S., 1, 14), and authorities cited in the opinion. And this rule of concurrence with the conclusions of the trial and appellate

> courts is given more weight when in the first instance the facts are found by a master or a jury. *Furrer* v. *Ferris* (145 U. S., 132), and cases cited in the opinion. These propositions we have often affirmed.

In *Hy-Yu-Tse-Mil-Kin* v. *Smith*, Mr. Justice Peckham said for the court:

> The appellant further contends that the weight of the evidence shows the appellee is not a member of the Walla-Walla tribe of Indians. We are not disposed to review that question of fact, which has been determined by the special examiner and adopted by the Circuit Court and the Circuit Court of Appeals. *There is evidence upon which the fact as found may be based*, and it is not so plainly erroneous as to call upon this court to vary from its usual rule not to review the unanimous finding upon questions of fact of two courts, unless such finding is plainly erroneous. (*Stuart* v. *Hayden*, 169 U. S., 1, 14; *Baker* v. *Cummings*, 169 U. S., 189, 198; *The Carib Prince*, 170 U. S., 655; *Towson* v. *Moore*, 173 U. S., 17; *Smith* v. *Burnett*, 173 U. S., 430, 436; *Brainard* v. *Buck*, 184 U. S., 99.)

This doctrine of concurrence is given more weight by the finding of fact in the first instance by the Board of General Appraisers, whose findings, when supported by evidence, will not be disturbed on appeal.

> *In re Van Blankensteyn*, 56 Fed. 474, 475, C. C. A.
>
> *Apgar* v. *United States*, 78 Fed. 332, 334, C. C. A.

Vandiver v. *United States*, 156 Fed. 961, 962, C. C. A.

United States v. *Reibe*, 1 Ct. Cust. App. 19, 20.

Carson v. *United States*, 2 Ct. Cust. App. —; T. D.

The Court of Appeals, however, found "the reasoning in the Steinhardt case persuasive," and held that the articles are not dutiable as braids because they are elsewhere specially provided for as bindings. In reaching this conclusion they relied, not upon the definition of "braid" in the Standard Dictionary, as the Circuit Court did in the *Steinhardt case*, but on the definition of "binding" in that dictionary.

These braids are not bindings, for tariff purposes, and, therefore, are not elsewhere provided for under that name. On the contrary, the record shows that these braids are not used for any such purpose, and therefore they are not bindings under the tariff act, and are not specially provided for elsewhere than in paragraph 339.

They are invoiced as braids (R., 9, 13, 19); labeled in this country as well as abroad as braids (R., 32, 33, 41, 44, 78, 98, 101, 112, 137, 138); advertised as braids (R., 139) and bought and sold as braids.

The testimony for the Government is explicit that such articles were not commercially designated as bindings. This includes testimony in prior cases incorporated in this record. Every witness called for the Government in the present case so testified. All were competent. Those who were buyers for large

retail concerns were obviously qualified to testify as to terms used in the wholesale trade because they bought at wholesale for their respective houses. (R., 63, 71, 72, 81, 83). They, moreover, testified against their business interest, which naturally was to get a low rather than a high rate of duty. The testimony in part is as follows:

Farrell (R., 64):

Q. Would you call any of these exhibits I have shown you (referring to collective Exhibits A, B, and C) bindings?

A. I wouldn't call these bindings; no, not any of them.

Q. They are not known in the trade as bindings?

A. No, not as bindings.

Wilson (R., 67):

By Mr. WASHBURN:

Q. For covering seams or binding seams?

A. For trimming. They are featherstitch braids, used for trimmings and used over the seams.

Q. Seam coverings, aren't they?

A. Yes.

By Mr. NICHOLS:

Q. How are they ordered?

A. Featherstitch braids.

Q. When you have said seam coverings you only described their use?

A. Their use; they are put over the seams, on account of the fancy work on them; that makes them the trimming.

Q. Could you use any of them as binding?

A. No, sir.

Q. They are never called bindings?

A. No, sir.

Q. Are you familiar with what are known in the trade as bindings?

A. I buy them.

Q. You mean bindings are something entirely distinct from these exhibits?

A. Yes, sir.

Forsythe (R., 69):

Q. Can they be used as bindings?

A. No, sir.

Q. Are you familiar with what is known in the trade as bindings?

A. Yes.

Q. Are they an entirely distinct class of goods?

A. Yes; entirely.

Q. Would the fact that these Exhibits A and B are sometimes used to cover seams, would that make them bindings in any sense?

A. No; they couldn't be used as a binding; they are used as a finish, the narrow ones are used as a finish, where they join a seam together, like this here [indicating].

Stern (R., 74):

Q. Are you familiar with what is known as bindings in the trade?

A. Yes, sir.

Q. And are they a different kind of article?

A. Different kind of articles.

Q. Sold as——

A. Sold as bindings.

Q. Referring to this Exhibit E, for instance, and the narrow piece of cloth that is used to

cover the seam, made out of the same material as the garment, is that what you call a—— or what would you call that?

A. A binding tape.

Q. Does that in any way resemble any of these Exhibits A, B, or C?

A. No, sir.

Schloss (R., 78):

By Mr. NICHOLS:

Q. Are any of these goods known as "bindings" in the trade?

A. No.

By Mr. WASHBURN:

Q. You don't carry bindings, do you?

A. Yes; we sell and manufacture and buy bindings.

Williams (R., 79):

Q. They are bought and sold under the name featherstitch braids?

A. No other term.

Q. Are any of them known as bindings?

A. I would say no.

Q. That is a distinct class of articles, bindings?

A. Yes.

Heaphy (R., 84):

Q. You have always bought them under the commercial term featherstitch braids?

A. Yes, sir.

Q. And they are not bought as bindings?

A. No, sir.

Q. Or by any other name in fact?

A. No, sir; featherstitch braids is the only term that is ever used by us.

There is, moreover, testimony of witnesses for appellee to the same effect. Importer Steinhardt, after stating that the articles were known in trade as "seam bindings," "featherstitch braids," and "herringbone," testified in his own case (R., 179):

> Q. Is there a class of goods that you buy and sell by the commercial designation of bindings, exclusively?
>
> A. We have some bindings; yes, sir.
>
> Q. Will you describe what would be technically a binding in trade?
>
> A. A binding is an article—it is a tape, of silk or cotton, for finishing articles, to finish *the ends*, to complete an article.

Blaskopf, importer's witness in the present case, after stating on cross-examination that the seam covering is a braid, testified on redirect examination (R., 24):

> Q. Do you call it a binding also?
>
> A. You can not very well call it a binding, no; more of a braid, finishing braid.
>
> Q. It is, however, a seam binding?
>
> A. It is a seam banding.

Baruch, appellee, testified (R., 21):

> Cross-examination by Mr. NICHOLS:
>
> Q. Featherstitch braid is a kind of braid that you import quite generally?
>
> A. Yes, sir.
>
> Q. How long have these been known as featherstitch braids?
>
> A. As long as I can remember; it is about fourteen years.

Q. And known by any other name than featherstitch braids?

A. They are known by names such as seam binding, finishing tapes, and herringbone.

Q. Do you mean to testify that those things are all different kinds of featherstitch braids?

A. All the same.

Q. Your testimony refers to all the articles marked "Exhibits A, B, and C," which have just been shown you?

A. Yes, sir.

"*Seam* bindings" should not be taken for "bindings." The two terms stand for different things. The latter word appears alone, sometimes in leading questions, but only one (a manufacturer) of importer's witnesses in the present case, replying to specific inquiries for the names applied in trade to the articles in suit, mentioned "bindings" without "seam" or other qualifying or descriptive word (R., 21, 23, 27, 32, 35, 38, 39, 41, 46, 48, 49, 55, 56, 59), and his testimony has reference largely to terms used by the girls in his factory. (R., 52–54.)

"Bindings," commercially, is a specific name for tape or strips used to bind the edges of garments. They are folded or doubled over the edge. (R., 24, 28, 62–65, 67, 70–72, 74, 79, 88, 90, 158, 185.) The very narrow braids in suit are manifestly not adapted to such use.

"Seam bindings" do not bind anything, but, as admitted by witnesses for the importer, are used flat to cover seams and to give the garment a better or finished appearance. (R., 20, 22, 24, 29, 32, 33, 35,

38, 40, 41, 44, 48, 50, 52, 53, 55, 90, 91, 143.) The term is descriptive of use as coverings of seams. "Seam coverings" is more correct. (R., 28, 35, 41, 44, 58, 59, 67, 79.)

Other subordinate terms refer to special varieties or characteristics of the braids and are used in the retail trade. (R., 48, 75, 82, 84, 86, 109, 185.) The word "herringbone," for instance, denotes a stitch or pattern. (R., 28, 32, 35, 41, 64, 72, 79, 147.) "Seam banding" and "finishing tapes" are terms of frequent use. The meaning of "seam banding" is indicated in the statement of importer's witness Alvis (R., 58), that collective Exhibit A is used "to cover a seam as a banding"—a different article from binding, as shown by the separate provision therefor in paragraph 320 of the act of 1897. "Finishing tapes" obviously signifies an ornamental effect not produced by tape. Neither term supports the contention that the articles in suit are "bindings."

Nor does the effort of appellee's counsel to show that *silk taffeta* bindings are used flat (R. 81, 85, 88) tend to prove that cotton braids are bindings.

Featherstitch braids are more expensive and elaborate than bindings, and are used essentially to ornament or embellish garments (R. 24, 25, 29, 40, 54, 55, 58, 64–70, 74, 79, 84, 91), while bindings serve a practical use only, namely, to keep edges from raveling. It is wholly unnecessary to use these braids merely to *cover* seams; a plain strip without any ornamentation whatever would serve the purpose as well (R. 22, 26, 29, 61, 63, 64, 79); the plain object

of using the featherstitch braids for that purpose is to secure a finished and ornamental effect.

Braids do not have to be trimmings to come within paragraph 339 of the act of 1897. The law reads "embroideries and all trimmings, including braids * * *," but the word "including" before "braids" in that paragraph was used not by way of specification but by way of addition. (*Hiller* v. *United States*, 106 Fed., 73, 74, C. C. A.)

Both terms, however, might properly be applied, "trimmings" as descriptive of their character and use and "braids" as their commercial designation. In giving a finish or better appearance to a garment the articles are in the nature of trimmings. This is so whether they are used over seams or elsewhere on the garment. (R., 58, 62, 64–68, 76, 79, 84, 158, 161 *et seq.*, 178, 183.) Wherever used they are undoubtedly ornamental. Ornamentation is an element of the definition of "braids" but not of "bindings" in the dictionary relied on by the Court of Appeals, the only object of the latter's use being utility.

If such braids should be regarded as bindings when used to cover seams, they nevertheless could not be classified as the latter. The imported articles can not be followed into trade to ascertain their use before the assessment of duties. Classification must be determined upon an examination of the merchandise in its condition at the time of importation, when duty attaches. Indisputably braids at that time, they could not be classified as bindings upon

the assumption that they would be so used when as a matter of fact they might be used as braids. As was said in the leading case of *Worthington* v. *Robbins* (139 U. S., 337, 341), "it is apparent, from the facts stated, that the customs officers could not determine from an examination of the article to which of the uses named it was to be applied." It is immaterial whether the use elsewhere than on seams be extensive or slight. Use is not made a criterion by the law and chief use as such would not control. (*Loeb* v. *United States*, 150 Fed., 327, 328, C. C. A.)

The test is the name of the articles. They can not be both braids and bindings for tariff purposes. (*Arthur* v. *Stephani*, 96 U. S., 125, 127, 128; *Robertson* v. *Rosenthal*, 132 U. S., 460, 464; *Seeberger* v. *Cahn*, *supra*.) Congress has unmistakably distinguished them in absolutely independent provisions in the two tariff acts—1897 and 1909, *supra*—in which both appear. Braids, but not cotton bindings, were provided for by name in earlier tariffs. They were in paragraph 263 of the act of 1894, corresponding to paragraph 320 of the act of 1897, and were transferred to paragraph 339 of the latter act. As was said in *Hiller* v. *United States* (*supra*) "this comparison of the two acts indicates that Congress intentionally took braids out of the 45 per cent paragraph, where it had been in 1894, and put the article into a paragraph imposing a higher rate of duty; and that it intended to impose the rate upon the articles generally, irrespective of the use to which they might be applied."

As ordinary meaning can not be resorted to in derogation of commercial designation, the articles in suit can not be taken out of paragraph 339 of the act of 1897, unless shown to be bindings, not by a dictionary, but by commercial usage. Importers' witnesses testified that the word "bindings," in paragraph 320, is a commercial term. (R., 177, 179, 180, 181, 186.) That being so, its commercial meaning must, under the authorities, govern. To classify the braids under paragraph 320, they must be shown by proof to be definitely, uniformly, and generally designated and known in commerce as bindings.

> *Seeberger* v. *Schlesinger*, 152 U. S., 581, 585.
> *Maddock* v. *Magone*, 152 U. S., 368, 371.
> *Sonn* v. *Magone*, *supra*.

Such proof is palpably lacking. The Circuit Court of Appeals consequently erred in applying a meaning not of commerce as against a commercial designation for the articles as braids.

But if ordinary meaning could properly be invoked, to the exclusion of commercial designation, it would not show these braids to be bindings. The definition to be sought is not of one but of all the standard American dictionaries. Webster, Worcester, and the Century all limit "binding" to something that secures *edges*. They define it as follows:

Webster:

> * * * ; something that secures the edge of cloth from raveling.

APPENDIX.

PROVISIONS OF TARIFF ACTS OF 1894, 1890, AND 1883, CORRESPONDING TO PARAGRAPHS 339 AND 320 OF THE TARIFF ACT OF 1897, TOGETHER WITH SAID PARAGRAPHS.

1897.

Par. 320. Bandings, beltings, bindings, bone casings, cords, garters, lining for bicycle tires, ribbons, suspenders and braces, tapes, tubing, and webs or webbing, any of the foregoing articles made of cotton or other vegetable fiber, whether composed in part of india rubber or otherwise, and not embroidered by hand or machinery, forty-five per centum ad valorem; spindle banding, woven, braided or twisted lamp, stove, or candle wicking made of cotton or other vegetable fiber, ten cents per pound and fifteen per centum ad valorem; loom harness or healds made of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, fifty cents per pound and twenty-five per centum ad valorem; boot, shoe, and corset lacings made of cotton or other vegetable fiber, twenty-five cents per pound and fifteen per centum ad valorem; labels, for garments or other articles, composed of cotton or other vegetable fiber, fifty cents per pound and thirty per centum ad valorem.

Par. 339. Laces, lace window curtains, tidies, pillow shams, bed sets, insertings, flouncings, and other lace articles; handkerchiefs, napkins, wearing apparel,

and other articles, made wholly or in part of lace, or in imitation of lace; nets or nettings, veils and veilings, etamines, vitrages, neck rufflings, ruchings, tuckings, flutings, and quillings; embroideries and all trimmings, including *braids*, edgings, insertings, flouncings, galloons, gorings, and bands; wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a letter, monogram, or otherwise; tamboured or appliquéed articles, fabrics or wearing apparel; hemstitched or tucked flouncings or skirtings, and articles made wholly or in part of rufflings, tuckings, or ruchings; all of the foregoing composed wholly or in chief value of flax, cotton, or other vegetable fiber, and *not elsewhere specially provided for in this act*, whether composed in part of india rubber or otherwise, sixty per centum ad valorem: *Provided*, That no wearing apparel or other article or textile fabric, when embroidered by hand or machinery, shall pay duty at a less rate than that imposed in any schedule of this act upon any embroideries of the materials of which such embroidery is composed.

1894.

Par. 276. Laces, edgings, nettings and veilings, embroideries, insertings, neck rufflings, ruchings, trimmings, tuckings, lace window curtains, tamboured articles, and articles embroidered by hand or machinery, embroidered handkerchiefs, and articles made wholly or in part of lace, rufflings, tuckings, or ruchings, all of the above-named articles, composed of flax, jute, cotton, or other vegetable fiber, or of which these substances or either of them, or a mixture of any of them is the component material of chief value,

not specially provided for in this act, fifty per centum ad valorem.

Par. 263. Cords, *braids*, boot, shoe and corset lacings, tapes, gimps, galloons, webbing, goring, suspenders and braces, woven, braided, or twisted lamp or candle wicking, lining for bicycle tires, spindle binding, any of the above made of cotton or other vegetable fiber and whether composed in part of india rubber or otherwise, forty-five per centum ad valorem.

1890.

Par. 373. Laces, edgings, embroideries, insertings, neck rufflings, ruchings, trimmings, tuckings, lace window curtains, and other similar tamboured articles, and articles embroidered by hand or machinery, embroidered and hemstitched handkerchiefs, and articles made wholly or in part of lace, rufflings, tuckings, or ruchings, all of the above-named articles, composed of flax, jute, cotton, or other vegetable fiber, or of which these substances or either of them, or a mixture of any of them, is the component material of chief value, not specially provided for in this act, sixty per centum ad valorem: *Provided*, That articles of wearing apparel, and textile fabrics, when embroidered by hand or machinery, and whether specially or otherwise provided for in this act, shall not pay a less rate of duty than that fixed by the respective paragraphs and schedules of this act upon embroideries of the materials of which they are respectively composed.

Par. 354. Cotton cords, *braids*, boot, shoe, and corset lacings, thirty-five cents per pound; cotton gimps, galloons, webbing, goring, suspenders, and braces, any of the foregoing which are elastic or non-

elastic, forty per centum ad valorem: *Provided*, That none of the articles included in this paragraph shall pay a less rate of duty than forty per centum ad valorem.

1883.

Par. 325. Cotton laces, embroideries, insertings, trimmings, lace window curtains, cotton damask, hemmed handkerchiefs, and cotton velvet, forty per centum ad valorem.

Par. 324. Cotton cords, *braids*, gimps, galloons, webbing, goring, suspenders, braces, and all manufactures of cotton, not specially enumerated or provided for in this act, and corsets, of whatever material composed, thirty-five per centum ad valorem.

Par. 337. Flax or linen laces and insertings, embroideries, or manufactures of linen, if embroidered or tamboured in the loom or otherwise by machinery, or with the needle or other process, and not specially enumerated or provided for in this act, thirty per centum ad valorem.

Par. 495. Webbing, composed of cotton, flax, or any other materials, not specially enumerated or provided for in this act, thirty-five per centum ad valorem.

○